Supreme Court, U.S.
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In The

Supreme Court of the United States

ARTHUR BIEGANOWSKI, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does substantial interference with the Due Process Clause and the Sixth Amendment right to call witness and adduce evidence in defense of criminal charges occur when the government makes known frivolous threats to a defense witness on the eve of testimony?

II. When a defendant relies upon the theory of government misconduct, can frivolous, intra-trial threats by the prosecutrix be barred from evidence without a violation of due process?

PARTIES TO THE PROCEEDINGS

Petitioner

Arthur Bieganowski, M.D.

Respondent

The United States of America

Other Parties

Victor Bieganowski, J.D., Richard J. Goldberg, C.P.A., Lucy B. Campos, Maria Romero, Gustavo Diaz, Jaime Jesse Lopez, Patricia Yvonne Reyes and Guadalupe Rodriguez Morales were parties to the proceedings below and have no interest in the outcome of the petition.

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PETITION FOR WRIT OF CERTIORARI

Arthur Bieganowski, M.D. ("Bieganowski") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 313 F.3d 264 (5th Cir. 2002) and is reproduced in Appendix A. The judgment of the United States District Court for the Western District of Texas, El Paso Division, is unreported and is reproduced in Appendix B. The order of the Court of Appeals denying Bieganowski's petition for rehearing is unreported and is reproduced in Appendix C.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was issued on November 22, 2002. A timely petition for rehearing was denied by that court on December 30, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . .

STATEMENT OF THE CASE

I. The Proceedings Below

On August 4, 1998, the United States of America filed a twenty-three count indictment in the United States District Court for the Western District of Texas, El Paso Division, against Dr. Bieganowski and eight others, alleging that Dr. Bieganowski conspired to defraud private and government insurance carriers (Count 1), committed mail fraud (Counts 2-14), and laundered money (Count 22). Dr. Bieganowski pleaded not guilty to the indictment and proceeded to a trial which lasted from March 13 to May 12 of 2000. The jury ultimately found Dr. Bieganowski guilty of Counts 1, 2, 5, 7-11, 13 and 22 and not guilty of Counts 3, 4, 6, 12, and 14. The trial court sentenced Dr. Bieganowski to 60 months in prison on Counts 1, 2, 5, 7, 8, 9, 10, 11, and 13, and 168 months on Count 22, the sentences imposed on Counts 2, 5, 7-11, 13 and 22 to run concurrently to the sentence imposed on Count 1. The District Court imposed concurrent two-year terms of supervised release as to each count, and restitution in the amount of $23,049,853.38. The District Court ordered Dr. Bieganowski to forfeit the net proceeds of the sale of his home and eleven million dollars ($11,000,000.00) in U.S. currency. No fine was imposed.

The Fifth Circuit Court of Appeals affirmed Dr. Bieganowski's conviction by opinion dated November 22,

2002. App. A. The Fifth Circuit denied Dr. Bieganowski's Petition for Rehearing by Order dated December 30, 2002. App. C.

II. Material Facts

Dr. Bieganowski practiced pain management medicine in El Paso, Texas from approximately 1984 until his arrest in 1998. Over the years, Dr. Bieganowski built his practice to include psychiatric and neurological services as well as acupuncture, physical therapy, biofeedback, occupational therapy, work hardening, aquatics, vocational rehabilitation, chiropractic, GED and citizenship classes and vocational rehabilitation. In the beginning of his practice, on a routine day, Dr. Bieganowski and his associates would see 40-60 patients. Toward the end of his career, Dr. Bieganowski had a routine patient load of 134 patients per day.

Dr. Bieganowski employed approximately forty (40) people in his practice. If the practice did not receive $10,000 per day in proceeds, it could not meet the daily office expenses. Occasionally, Dr. Bieganowski was either not paid or paid at a later date due to revenue shortages. Bills were not always paid and a few checks from the practice bounced. Employees began helping with progress notes to facilitate collections from insurance companies. Furthermore, due to the sheer size of Dr. Bieganowski's practice, extensive errors occurred in his billing procedures.

Prior to his indictment, Dr. Bieganowski hired El Paso attorney Jim Darnell. Appendix H. Attorney Darnell, in turn, hired Linda Howard, a medical coding expert, to evaluate the billing practices of Dr. Bieganowski's medical

entities. *Id.* Attorney Darnell billed Dr. Bieganowski for 180 hours of Ms Howard's services via an invoice for legal services. *Id.*

Eight months before trial, Dr. Bieganowski filed a motion to appoint an expert witness or release funds to hire expert witnesses and consultants. Appendix K; Appendix L. The District Court denied the motion. Appendix T.

Ten days before trial, Dr. Bieganowski filed his required notice of experts, wherein he again informed the trial court that he was unable to hire an expert witness due to lack of funds. Appendix M. On that same date, Dr. Bieganowski again moved for appointment of an expert or release of funds to hire an expert. Appendix U. Six days before trial, the District Court granted Dr. Bieganowski's motion for authorization of expert witness funds. Appendix N.

Three days later, Dr. Bieganowski filed a motion for continuance and brief in support, wherein he explained that Linda Howard (Ms Howard) was hired on that date as an expert witness and that Ms Howard needed additional time to prepare for the trial. Appendix O; Appendix P. Attached to the motion was the affidavit of Ms Howard, wherein she estimated she would require two (2) months to complete a detailed analysis of the four hundred (400) boxes of records taken by the government from Dr. Bieganowski's office. App. O, at A-170 to A-171. Ms Howard stated:

> I feel that based upon what I have seen today, (1-10-00) at Dr. Bieganowski's attorney's office, I would not be of much assistance if additional time is not given to me to review the

> documents because when I previously, consulted at his practice, I was not looking or working on past documents or an audit. I only analyzed certain job-functions presently being performed and if any needed to be corrected in my opinion.

App. O, at A-171. The motion was denied by function of law, as trial began on March 13, 2000.

Following the close of the government's case-in-chief, Dr. Bieganowski alerted the District Court to the prosecutrix' intimidation of Ms Howard. Appendix D. The prosecutrix admitted to the court that she communicated a threat of prosecution, as against Ms Howard, to Dr. Bieganowski's counsel. App. D, at A-70. In response to the trial court's questions, the prosecutrix admitted she was seriously considering indicting Ms Howard for misprision of a felony. App. D, at A-70, A-71. The trial judge noted: "If there was some way I could rule that she is not going to be indicted, I would do that, but I can't do that." App. D, at A-73. Dr. Bieganowski repeatedly moved for a mistrial, but the trial court denied the motions. App. D, at A-73, A-78, A-80.

A few days later, the prosecutrix moved, *in limine*, to bar any evidence to the jury regarding about her threats. Appendix E. The prosecutrix represented to the court that, with regard to the potential of perjury, attorney Gary Weiser heard Ms Howard state she once worked for the FBI. App. E, at A-83.

The prosecutrix' allusion to a perjury charge further intimidated Ms Howard, as represented to the court at a bench conference. Appendix F. Defense counsel personally spoke to attorney Gary Weiser, who informed defense counsel that he had never spoken to the prosecutrix. App.

F, at A-88. Thus, the prosecutrix made factual misrepresentations to the court in support of her threat against Ms Howard.

Later that day, Dr. Bieganowski made a record, outside the presence of the jury, of the intimidation experienced by Ms Howard. Appendix G. Ms Howard testified she took the prosecutrix' threats very seriously, she was very, very scared and unsure whether or not she should take the witness stand. App. G, at A-95, A-96. She felt as though she had been placed in a room with a gun to her head. App. G, at A-96. She consulted with independent counsel. *Id.* Her preparation for her testimony was severely hampered. App. G, at A-97. She described her emotions as "I feel like I don't have my capabilities, my head is so very clouded. I'm scared. I'm very confused. Physically, it's affected me. Healthwise, I'm a wreck." App. G, at A-101. She affirmed that her health was affected by the prosecutrix' threats. App. G, at A-101, A-104.

The Fifth Circuit Court of Appeals rejected Dr. Bieganowski's challenge to the prosecutrix' intimidation and concluded that because the prosecutrix withdrew her threats prior to Ms Howard's testimony, such threats did not amount to a substantial interference. App. A, at A-50, A-51.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals for the Fifth Circuit erred in finding that the prosecutrix' threats did not amount to a substantial interference.

A. A criminal defendant must be accorded the right to put on witnesses and other evidence in support of his case.

"[The] central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. . . ." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) [*citing*: *United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L.Ed.2d 141 (1975)]. It is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another. *United States v. Robinson*, 485 U.S. 25, 33, 108 S. Ct. 864, 869, 99 L.Ed.2d 23 (1988).

Indeed, the Sixth Amendment guarantees an accused individual the right to present his own witnesses to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967); *United States v. Haese*, 162 F.3d 359, 366 (5th Cir. 1998) [*citing*: *United States v. Weddell*, 800 F.2d 1404, 1410 (5th Cir. 1986)], *cert. den.*, 526 U.S. 1138, 119 S. Ct. 1795, 143 L.Ed.2d 1022 (1999); *United States v. Thomas*, 488 F.2d 334, 335 (6th Cir. 1973). The circuit courts have repeatedly held that "substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant. . . ." *Haese*, 162 F.3d at p. 366 [*quoting*: *Weddell*, 800 F.2d at p. 1410, *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980)]; *Accord*: *Newell v. Hanks*, 283 F.3d 827, 837 (7th Cir. 2002); *United*

States v. Vavages, 151 F.3d 1185, 1188 (9th Cir. 1998); *United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999).

The Fifth Circuit has gone so far as to hold that governmental interference with defense witnesses is harmful *per se*. *Haese*, 162 F.3d at 366 ("If such due process violation occurs, the court must reverse without regard to prejudice to the defendants."); *United States v. Hammond*, 598 F.2d 1008, 1012-1013 (5th Cir. 1979) ("We . . . hold that this type of due process violation is harmful per se.").

B. The circuit courts treat frivolous prosecutorial threats seriously.

In cases where the government threatens a known defense witness with prosecution prior to that witness's testimony, the various circuit courts have often reversed the defendant's conviction. The Fifth Circuit for example, in *Hammond*, *supra*, reviewed an FBI agent's consultation with a defense witness, during a break in the trial, whereby the agent mentioned the witness's current indictment in another state and a different case. 598 F.2d at 1012. The agent told the witness that if he continued to testify, he would have nothing but trouble in his unrelated case. *Id*. The next morning, the witness, as well as another defense witness who had yet to take the stand, were both subpoenaed to appear before a grand jury. *Id*. Thereafter, both witnesses refused to testify at trial. *Id*. The Fifth Circuit held:

> This circuit recently stated the rule as follows, "substantial government interference with a defense witness' free and unhampered choice to testify violates due process" rights of the defendant.

> *United States v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) [defense witness intimidated by terms of plea bargain wherein witness agreed not to testify in a co-defendant's trial].
>
> In this case, it was certainly reasonable for the defense witness Parsons to interpret agent Peisner's comments as threats to retaliate if Parsons continued to testify. Because of these comments, Parsons did refuse to testify. Accordingly, we find that agent Peisner's comments constituted a "substantial governmental interference" with defense witness Parson's "free and unhampered choice to testify." We therefore conclude that this governmental interference deprived the defendant of his due process right to present his witnesses.

Hammond, 598 F.2d at 1012-1013.

The Fifth Circuit revisited the issue of witness intimidation in *Goodwin*, *supra*. In *Goodwin*, two defense witnesses, both federal inmates, could have helped the defendants establish their theories of government entrapment. 625 F.2d at 700, 702. Prison officials threatened the two witnesses with negative consequences if they testified at the defendants' trial. 625 F.2d at 702-703. The Fifth Circuit Court held:

> These allegations raise very serious questions. Threats against witnesses are intolerable.
>
> * * *
>
> On this appeal we now face unresolved claims of government intimidation of defense witnesses. If we were not reversing the convictions on other grounds, we would be required to remand to the district court for findings on the

> validity of these claims. And if proven such violations of due process would require automatic reversal.

Goodwin, 625 F.2d at 703.

Other circuits have made similar findings. For example, in *Golding*, *supra*, the prosecutor had a conversation with the defendant's attorney, after which the witness was advised to retain her own counsel. 168 F.3d at 702. The witness eventually decided not to testify for fear of prosecution. *Id.* The Fourth Circuit reversed the defendant's conviction on the basis of prosecutorial misconduct. 168 F.3d at 705.

An earlier Fourth Circuit case is even closer to the facts in the case at bar. In *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982), the prosecutor made an "eleventh hour call" to the attorney of a critical witness (a formerly indicted co-defendant), suggesting the witness would be well-advised to remember the Fifth Amendment. 682 F.2d at 479. Despite the fact that the witness took the stand and "answered many questions," she invoked the Fifth Amendment as to certain incriminating matters. 682 F.2d at 475. Nonetheless, the Fourth Circuit held: "The government's 'suggestion' destroyed the choice of Edwards to testify freely." *MacCloskey*, 682 F.2d at 479.

Indeed, the Fourth Circuit has made a powerful admonition to government attorneys and agents with regard to contacting a defense witness's attorney and admonishing the attorney about potential consequences of the witness's testimony:

> This is not the identical act that we condemned in *United States v. MacCloskey*, 682 F.2d 468, 479

> (4th Cir. 1982), but it is similar, and since *MacCloskey was decided almost a year before the present action was tried, the United States Attorney's office should have been aware of it and refrained from making any unsolicited call to an attorney for a prospective witness to remind them of the consequences of perjury. Such calls are unnecessary because most witnesses in criminal cases are aware of the laws against false swearing. Such calls are also dangerous and foolish – dangerous because they can violate a defendant's due process right to present his defense witnesses freely, and foolish because of the warnings given by this court and others.*

United States v. Teague, 737 F.2d 378, 381-382 (4th Cir. 1984) (emphasis in original).

Similarly, in *Vavages*, *supra*, the defendant listed his common-law wife as a witness. 151 F.3d at 1188. Based upon the defendant's alibi notice and proposed witness list, a government agent interviewed the common-law wife. *Id.* Just before trial, the prosecutor warned the common-law wife's attorney that if the wife testified falsely, the government could bring perjury charges against her and could withdraw the plea agreement in the wife's separate criminal case. *Id.* Although the wife's attorney did not feel intimidated by the prosecutor's contacts, the court reversed the defendant's conviction, holding *inter alia*:

> [W]e disapprove of such conduct where the prosecutor lacks any substantial basis in the record for believing the witness is lying. That [the wife's] testimony would have contradicted the testimony of the government's own witnesses does not form a sufficient basis for the prosecutor's warning. Rather, unusually strong admonitions against

> perjury are typically justified only where the prosecutor has a more substantial basis in the record for believing the witness might lie – for instance, a direct conflict between the witness' proposed testimony and her own prior testimony.

Vavages, 151 F.3d at 1190.

In *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987), the Eleventh Circuit, in a tax evasion case, held that government agents' suggestions to the defendant's accountant that the accountant could be a "defendant in a criminal case" were threats which ultimately caused the accountant to testify falsely out of fear of prosecution. 830 F.2d at 151-153. The defendant intended to call his accountant as a witness to show the accountant was aware of and approved the defendant's method of reporting income. 830 F.2d at 151-152. Following his meeting with the government agents, the accountant, through his attorney, telephoned one of the interviewing agents to say the accountant wanted to be a government witness rather than a defendant. 830 F.2d at 153. The Eleventh Circuit concluded the defendant was "deprived of an important defense witness by substantial interference on the part of the government. 830 F.2d at 154. A new trial was ordered. *Id.*

The Third Circuit dealt with prosecutorial threats to a witness, communicated to the witness through the defendant's attorney, by reversing the defendant's conviction. *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976). In *Morrison*, the defendant's defense to drug charges centered upon his girlfriend, a minor at the time of the alleged crime, who was prepared to testify that she was involved in the conspiracy to sell drugs, not the defendant. 535 F.2d at 225. Although the girlfriend had originally been indicted

with the defendant, charges were dropped due to the girl's age. *Id.* During trial, the prosecutor sent messages to the girlfriend, via defense counsel, warning that she could be liable for drug charges and could be federally prosecuted for perjury. *Id.* The prosecutor subpoenaed the girlfriend and had her brought to his offices, where he again warned her of the perils of her testimony. 535 F.2d at 225-226. Thereafter, the girlfriend felt intimidated. 535 F.2d at 226. She was called to the witness stand the next morning and, although she answered "many of the questions fully and intelligently," she refused to answer more than thirty questions on the grounds of the Fifth Amendment. *Id.* The Third Circuit held:

> The actions of [the prosecutor] were totally unnecessary. [The witness] could have made a knowing choice of whether to testify or not on the basis of the formal warning from the court. The pressure brought to bear on her by the Assistant United States Attorney interfered with the voluntariness of her choice and infringed defendant's constitutional right to have her freely-given testimony.

Morrison, 535 F.2d at p. 228.

The Sixth Circuit has also shown that reversal is required in situations similar to those found in Dr. Bieganowski's case. In *Thomas*, *supra*, the defendant and two others were charged with conspiracy to counterfeit. 488 F.2d at 335. At the conclusion of the government's case, one co-defendant, Asaro, was granted an acquittal. *Id.* Subsequently, the defendant called Asaro to testify. *Id.* Defense counsel advised Asaro that his testimony could lead to prosecution for misprision of a felony. *Id.* The trial court also explained the matter to Asaro and Asaro eventually

sought counsel. *Id.* During a recess, a secret service agent told Asaro he would be prosecuted for misprision of a felony if he testified at trial. *Id.* Asaro refused to testify, despite the government's advice to the court that Asaro would not be prosecuted if he testified. *Id.* The Sixth Circuit held:

> There is no question but that it was completely unnecessary for the Government to approach the prospective witness. The transcript reveals that both the District Judge and counsel for the co-defendant Thomas went to considerable lengths to advise Asaro that his decision to testify should be based on full knowledge of the consequences, confirmed through his own counsel. Consequently the actions of the Assistant U.S. Attorney, through the secret service agent, in seeking out the prospective witness and on an ex parte basis gratuitously admonishing him cannot be viewed as servicing any valid purpose, even accepting the assertions of good faith. Further, considering the caution carefully expressed to Asaro in the courtroom, it is difficult not to regard the Government's later out-of-court communication with Asaro as an attempt to intimidate.
>
> The Government argues that its later statement to the District Court that Asaro would not be prosecuted based on his testimony was sufficient to overcome any prejudice inuring to the appellant. In this regard the Government stresses that the defense counsel's failure to recall the witness or to issue a subpoena ad testificandum should be a pivotal consideration. We cannot agree. There is an obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and

> the perhaps guarded testimony of a reluctant witness who is willing to appear only at the command of the court. Further, the Government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony. The result is that the misconduct of the Government directly produced an opportunity for the jury to draw prejudicial inferences from the fact that the witness failed to testify. In addition, the appellant makes the point that the Government's misconduct had a direct bearing on the defense counsel's trial strategy, suggesting that had Asaro testified appellant might not have. The Government's statement that it would forego prosecution will not serve to wipe out the prejudicial effect of the event. Nothing short of complete immunity, if even that, could have relieved Asaro's apprehension, and restored his free and voluntary choice, eliminating the prejudice.

Thomas, 488 F.2d at p. 336.

Finally, the D.C. Circuit, adjudicating government threats to a defense witness, also found reversal the appropriate remedy. In *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973), a murder case, the U.S. Attorney approached a defense eye-witness, telling the witness he might be prosecuted for concealing a deadly weapon and for aiding and abetting if the witness took the stand. 478 F.2d at 977. After consultation with a public defender, the witness refused to testify. 478 F.2d at p. 978. The D.C. Circuit held:

> We think the prosecutor's warning was plainly a threat that resulted in depriving the defendants of Twitty's testimony. The government

> argues in its brief that Twitty had a right to be advised that he might incriminate himself and be subject to prosecution if he elected to testify, and the government suggests that the prosecutor was only protecting Twitty's rights when he warned him. Even if the prosecutor's motives were impeccable, however, the implication of what he said was calculated to transform Twitty from a willing witness to one who would refuse to testify, and that in fact was the result. We therefore conclude that the prosecutor's remarks were prejudicial. As the Supreme Court of Michigan observed in *People v. Pena*, 383 Mich. 402, 406, 175 N.W.2d 767, 768 (1970), "[a] prosecutor may impeach a witness in court but he may not intimidate him – in or out of court." [Cites omitted.] If the prosecutor thought the witness should be advised of his rights then he should have suggested that the court explain them to Twitty. The matter would then have been presented to Twitty by the court without any threats or implication of retaliation.
>
> The treatment of the witness Twitty requires the reversal of Smith's conviction.

Smith, 478 F.2d at p. 979.

C. Dr. Bieganowski's case shows frivolous threats which chilled Ms Howard's ability to prepare for trial and consequently affected her trial testimony.

In Dr. Bieganowski's case, Ms Howard did take the witness stand, emotionally upset and unable to continue her last minute preparations for trial. Ms Howard told the district judge, under oath, that her eleventh hour, pre-trial preparations were hampered and she could not devote her

entire attention to the matter. App. G, at A-97. Ms Howard described herself, following the government's threats, as "clouded," "scared," "confused" and in poor health. App. G, at A-101, A-104.

In response to Ms Howard's expressed fear of testifying, the trial court threatened to arrogate the money Ms Howard had earned as a consulting expert in her rushed trial preparation. The colloquy went as follows:

> **THE COURT:** Well, I'll tell you what. How much have you paid her? Do you have a contract with her, Mr. Roberts?
>
> **MR. ROBERTS:** I –
>
> **THE COURT:** If you paid her any money, she has to return it to you, and you're not supposed to pay her any money until you get a final okay from me, if she's not going to testify.
>
> **MR. ROBERTS:** Your Honor, I paid her – I've paid her something like $16,000.
>
> **THE COURT:** All right. If she is not going to testify, she's breaching a contract, and she's got to return it.
>
> **MR. ROBERTS:** Okay. Now –
>
> **THE COURT:** To the registry of the Court, Mr. Roberts.

App. F, at A-88. In essence, the trial court threatened to sanction Ms Howard's reluctance with loss of her consulting fee.

With regard to the misprision of a felony charges, the prosecutrix claimed ignorance of Ms Howard's employment by an attorney when evaluating Dr. Bieganowski's billing

procedures. However, the government had long known of Ms Howard's arrangements with Dr. Bieganowski's pre-trial lawyer, and was reminded of the arrangement by testimony given *before* the prosecutrix made her threats. Appendix H; Appendix I.

Specifically, some eighteen *months* before Dr. Bieganowski's trial, an FBI Agent took a statement from Lucy Campos, Dr. Bieganowski's office manager, wherein Campos explained Dr. Bieganowski's attorney, Jim Darnell, hired Ms Howard. App. H. Approximately six days before the prosecutrix' threat, Campos testified on cross-examination that Ms Howard was paid as an expert through attorney Jim Darnell's billing to Dr. Bieganowski for legal services. App. I, at A-126 to A-128. Campos testified later that attorney Darnell hired Ms Howard to evaluate Dr. Bieganowski's billing practices. App. I, at A-129 to A-131. Three days later, the prosecutrix herself stated, within a question to Campos, that Dr. Bieganowski's lawyer provided Ms Howard as a coding expert to evaluate Dr. Bieganowski's billing practices. App. J.

Thus, the prosecutrix not only knew, long before her threats, that Ms Howard was working for attorney Darnell, but also actively represented that "Dr. Bieganowski's lawyer had provided [Ms Howard]." App. H. The prosecutrix was **not** communicating a good faith warning, as she alleged. Instead, knowing Ms Howard was protected by the attorney-client privilege and therefore not required to divulge the information she learned while evaluating Dr. Bieganowski's billing practices, the prosecutrix sought to intimidate Ms Howard and chill her preparation and testimony.

Indeed, the prosecutrix nearly succeeded in keeping Ms Howard off the witness stand altogether. Although Ms Howard did finally testify, she did so under extreme duress, as exemplified by Ms Howard's likening her emotional state to a time in her life when deaths and other stresses led her to physical illness, and under threat by the trial court.

In addition, Ms Howard was unable to continue to prepare for her testimony, based upon the prosecutrix' threats. App. G, at A-97. Moreover, Ms Howard doubted her ability to accurately recount details because she felt "very clouded." App. G, at A-101 to A-102. The effects of Ms Howard's fear and anxiety upon her final, already strained ability to prepare her testimony cannot be assumed or, indeed, down-played. As one court noted:

> There is an obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and the perhaps guarded testimony of a reluctant witness who is willing to appear only at the command of the court.

Thomas, 488 F.2d at p. 336. Such was the situation in Dr. Bieganowski's case. Ms Howard, Dr. Bieganowski's expert witness and the linchpin of his case, could not be hired until the District Court released funds with which to pay her. Indeed, she was not hired until the eve of trial, with some four hundred or more boxes of discovery necessitating review. Then, immediately before Dr. Bieganowski called Ms Howard to the stand, the prosecutrix conveyed a thinly-veiled threat of future prosecution, warning that Ms Howard should have her attorney present. Even when the prosecutrix seemed willing to forego misprision of a felony charges, she still hinted that a perjury charge could be forthcoming. When the District Court heard the basis of

the misprision charges, he instructed the prosecutrix that nothing further on the subject of Ms Howard's allegedly working "for" (rather than "with") the F.B.I. was to come before the jury. Nonetheless, the prosecutrix' arrow hit home and Ms Howard was thoroughly intimidated and barred from an ability to calmly continue to evaluate the government's evidence prior to being called to the witness stand.

The Fifth Circuit correctly noted that the prosecutrix' warnings to Ms Howard with regard to perjury charges involved a purely collateral matter. App. A, at A-52. The prosecutrix had no legally-viable reason, other than to chill Ms Howard's preparation and testimony, to threaten indictment based on inadmissible, collateral matters. The very fact that the prosecutrix threatened Ms Howard over issues which had no bearing on the case tends to show the government's motive for the threat was less than honorable.

D. The question presented is important.

The government's deliberate attempt to distort the judicial fact-finding process is not only "dangerous and foolish" (*Teague*, *supra*, 737 F.2d at 381-382) but also the sort of underhanded gamesmanship, intended to gain a tactical advantage, that should not be condoned by the judiciary of this country. To gloss over the prosecutrix' conduct in this matter is to wink at misconduct, thereby encouraging future gamesmanship. Neither justice nor the fundamental concept of due process are served by turning a blind eye to the prosecutrix' misconduct in Dr. Bieganowski's case, as the Fifth Circuit has done.

II. The Fifth Circuit erred in finding that the prosecutrix' threats were not additional evidence of governmental overreaching.

During the trial, the prosecutrix duly recognized that part of Dr. Bieganowski's defense was the government's coercion of witnesses into testifying against Dr. Bieganowski. Appendix Q. Dr. Bieganowski also proved that government agents who "infiltrated" Dr. Bieganowski's practice falsely claimed Dr. Bieganowski ordered unwarranted tests and procedures. Appendix R. Nonetheless, during Dr. Bieganowski's case-in-chief, the District Court refused to allow Dr. Bieganowski to put on evidence of the government's intra-trial threats against and intimidation of Ms Howard. App. E. The Fifth Circuit affirmed the District Court, reasoning that the passage of time between the government's coercion of witnesses and the prosecutrix' threats toward Ms Howard rendered the threats inadmissible.

A. Dr. Bieganowski adduced evidence of government gamesmanship.

The government introduced evidence that office manager Campos plead guilty to the charges against her. Yet, on cross-examination, Campos testified she had done nothing wrong. Appendix S. In addition, the government opposed every motion in which Dr. Bieganowski requested funds for an expert witness, despite the complex nature of medical coding and the massive amounts of documents involved in the case.

Furthermore, two government agents testified that Dr. Bieganowski ordered unnecessary testing when they posed as accident victims. Appendix R, at A-183 to A-187, A-203 to A-204. Cross-examination revealed, however, that

the agents indicated occult injuries which Dr. Bieganowski would have been remiss to ignore. App. R, at A-213 to A-262.

Specifically, government agent Rolando Lopez testified that he and agent Luz Sanabria-Garcia posed as car accident victims and visited Dr. Bieganowski's clinic. App. R, at A-183 to A-185. Agent Lopez allegedly told Dr. Bieganowski he felt no pain and had no symptoms of injury. App. R, at A-185 to A-186. Dr. Bieganowski allegedly said there was a problem with his neck and ordered x-rays, physical therapy and biofeedback. App. R, at A-186 to A-187. Agent Lopez alleged he repeatedly stated he had no injury. App. R, at A-203 to A-204.

On cross-examination, however, Agent Lopez revealed many cues he gave to Dr. Bieganowski and his staff which could indicate to a physician the presence of occult injuries. For example, Agent Lopez told Dr. Bieganowski's intermediary, Mr. Griego, that he (Lopez) and his fictitious wife "hurt a little bit" after the accident. App. R, at A-242 to A-244. Agent Lopez informed Griego that his "wife" was pregnant but that he and his "wife" left the hospital untreated after the fictional wreck because he did not have insurance and did not want to fill out the forms. App. R, at A-213 to A-214, A-244 to A-245. The accident report generated by the FBI stated that Lopez and Sanabria-Garcia had "possible injuries." App. R, at A-214 to A-215. The report showed that Lopez and Sanabria-Garcia had been taken to the hospital. App. R, at A-216 to A-217. The report indicated a "semi-serious" rear-end collision with property damage greater than $500. App. R, at A-219 to A-221. Lopez never told chiropractor Dr. Untersee that he had no injuries. App. R, at A-229 to A-230. Lopez never told physician's assistant Diaz that he had no injuries.

App. R, at A-232 to A-234. Lopez told Diaz he had never been examined at the hospital after the fictional wreck. App. R, at A-217 to A-218. Lopez also told Diaz that he and his "wife" suffered whiplash from the accident. App. R, at A-246. When Sanabria-Garcia was asked, on two different occasions, if she felt nervous, tense, uptight or had nightmares after the accident, Sanabria-Garcia responded "a little." App. R, at A-246 to A-247, A-255 to A-256. During Dr. Untersee's examination, Sanabria-Garcia noted that she could feel her muscles pulling on her left side. App. R, at A-250 to A-253. When Dr. Bieganowski asked Sanabria-Garcia if her back was sore, she responded, "a little." App. R, at A-256 to A-257. Lopez also told Dr. Bieganowski he initially felt discomfort in his neck and back. App. R, at A-258 to A-260. When Dr. Bieganowski attempted to dismiss Lopez and Sanabria-Garcia from further treatments, Lopez told Dr. Bieganowski about a number of missed appointments. App. R, at A-261 to A-262.

These record excerpts reveal that while Agent Lopez attempted to persuade the jury he had received unnecessary medical care, his communications to Dr. Bieganowski and his staff gave strong indications of potential injuries. Indeed, Dr. Bieganowski could have been sued for malpractice had he ignored the signs and symptoms alluded to by Lopez and Sanabria-Garcia. Yet the government attempted to show through Lopez and Sanabria-Garcia that Dr. Bieganowski's practice was a sham and his treatments were unnecessary and contra-indicated. The jury ultimately acquitted Dr. Bieganowski on the counts tied to Lopez' and Sanabria-Garcia's visits.

Finally, on the eve of Ms Howard's testimony, the government threatened her with criminal charges based upon irrelevant evidence and under the guise of ignorance of Ms Howard's position as a defense expert. Appendix D.

The evidence of the prosecutrix' threats to Ms Howard, coupled with evidence of the government's misleading and coercive tactics, would have shown that the government's gamesmanship was on-going and pervasive. Indeed, such evidence would have revealed that the government appeared to have a personal stake in the outcome of the suit, rather than merely seeking justice.

B. Similar fact patterns have warranted reversal of the conviction.

In two strikingly similar cases, the Fifth and Eleventh Circuits reversed the defendants' convictions because the trial court refused to allow in evidence of the government's misconduct. In both cases, government misconduct was presented as a defensive theory.

For example, in *United States v. Lowery*, 135 F.3d 957 (5th Cir. 1998), the defendant was convicted of obstruction of justice. 135 F.3d at 958. The defendant sought to adduce evidence of government intimidation of witnesses to gain a conviction in a related case. 135 F.3d at 959. The Fifth Circuit held that the trial court's exclusion of evidence of government intimidation was error

> because any evidence that the IRS was intimidating witnesses in the Sanders case would be relevant to Lowery's case, given that his theory of defense was that he was trying to encourage witnesses to tell the truth in the face of IRS pressure to do otherwise. It is well established that a criminal defendant is entitled to present his theory of defense, including witnesses, testimony, and exhibits. *See United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974). The grant of an overly broad Motion In Limine, coupled with related rulings on

> introduction of certain evidence and testimony, prevented Lowery from properly presenting his theory of defense to the extent necessary for a fair trial.

135 F.3d at 959.

Similarly, the Eleventh Circuit in *United States v. Doherty*, 233 F.3d 1275 (11th Cir. 2000), adjudicated the appeal of a conspiracy to defraud the IRS conviction. 233 F.3d at 1277. The defendants claimed they were merely truck drivers used by their employer to accomplish his tax fraud scheme. 233 F.3d at 1283. The defense intended to call John Moritz, an agent with the Texas Comptroller's Office, to show the defendants' lack of criminal intent. 233 F.3d at 1278, 1280, 1283. Prior to being called to the witness stand, Moritz was approached by an IRS special agent and informed that if he testified for the defense he would probably be indicted. 233 F.3d at 1280. The defendants moved to allow Moritz to testify about the special agent's threat in order to impeach the special agent's credibility. 233 F.3d at 1280. The motion was denied, and the special agent's testimony was struck from the record without the defendants' requested explanation to the jury as to the reasons for striking that testimony. *Id.*

On appeal, the Eleventh Circuit made the following holding:

> [Defendant] sought to impeach [the special agent] through Moritz by evidence of the threat from which the jury could properly infer that [the special agent] was an overzealous government agent who appeared to have a personal stake in the outcome of this trial. Such an inference could have produced a different verdict as to [the defendant], and for this reason we conclude that

> the exclusion of the Moritz impeachment testimony was reversible error. . . .

233 F.3d at 1284.

Like the defendants in *Lowery* and *Doherty*, Dr. Bieganowski attempted to show that the government pursued more than justice in his case. The government's overreaching escalated into outrageous conduct when the prosecutrix threatened Ms Howard on the eve of her testimony. Evidence of this threat would have greatly enhanced Dr. Bieganowski's ability to impeach the government's credibility and would have solidified Dr. Bieganowski's evidence of bad faith on the part of the government.

The Fifth Circuit held that, because the alleged witness intimidation occurred more than a year after the conduct charged in the indictment and had no relevance to it, *Lowery*, *supra*, is distinguishable. Respectfully, the Fifth Circuit missed the point.

The pattern of government intimidation of witnesses and gamesmanship was a major thrust of Dr. Bieganowski's defense. The government coerced office manager Campos to plead guilty, despite her belief in her innocence. The government sent agents to Dr. Bieganowski's office with reports of injuries, then attempted to show that Dr. Bieganowski ordered unnecessary tests. (The jury ultimately acquitted Dr. Bieganowski on the charges related to the government's covert "infiltration" of Dr. Bieganowski's office.) The government attempted to bar Dr. Bieganowski from expert testimony about his billing practices. Then, the government attempted to frighten Ms Howard, on bogus charges, from testifying.

Although *Lowery* has slightly different facts, the legal premise underlying the decision is wholly applicable to the facts at bar. Where a defendant's theory of the case involves government gamesmanship and witness intimidation, evidence thereof is admissible and relevant. 135 F.3d at 959. Due process demands that a criminal defendant be able to put on evidence which supports his theory of defense. *Robinson*, 485 U.S. at 33, 108 S. Ct. at 869.

Furthermore, the Fifth Circuit ignored *Doherty*, *supra*, which is directly on point with the facts at bar. In *Doherty*, the excluded government threats came during trial, just like the threats in Dr. Bieganowski's case. 233 F.3d at 1280. The trial court's refusal to allow evidence of the threats, inferring that a government agent had a personal stake in the outcome of the trial, was the basis for a reversal of conviction. 233 F.3d at 1284.

C. The question presented is important.

Like the facts in *Doherty*, and the legal premise in *Lowery*, Dr. Bieganowski has shown that the government's threat was additional evidence of Dr. Bieganowski's theory of defense, relevant and admissible. Dr. Bieganowski was denied due process because he was not allowed to show the government's on-going gamesmanship, which undermined the government's entire case against Dr. Bieganowski. Under the Fifth Circuit's guidance, valuable exculpatory evidence which occurs during trial can be barred simply because it arose during trial.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted to ensure that dangerous inroads are not cut into the Constitution's guarantee of due process and the right to put on evidence and witnesses in defense to criminal charges.

Respectfully submitted,

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APPENDIX "A"

313 F.3d 264

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50593

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR C. BIEGANOWSKI, M.D.,
RICHARD J. GOLDBERG, C.P.A.,
GUSTAVO DIAZ, AND JESSE JAIME LOPEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

(Filed Nov. 22, 2002)

Before GARWOOD and CLEMENT, Circuit Judges, and RESTANI,[1] Judge.

Joseph H. Gay, Jr., Asst. U.S. Atty., *Diane D. Kirstein* (argued), San Antonio, TX, for U.S.

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[1] Judge of the United States Court of International Trade, sitting by designation.

Randolph Joseph Ortega, Ellis & Otctega [sic], El Paso, TX, for Diaz.

Dick W. DeGuerin (argued), DeGuerin & Dickson, Houston, TX, for Goldberg.

Mary Stillinger (argued), El Paso, TX, for Lopez.

Charles Louis Roberts (argued), *Lauren K.S. Murdoch*, El Paso, TX, for Bieganowski.

GARWOOD, Circuit Judge:

Defendants-Appellants Gustavo Diaz (Diaz), Richard J. Goldberg (Goldberg), Jesse Jaime Lopez (Lopez), and Dr. Arthur C. Bieganowski (Bieganowski) appeal their convictions and sentences for various charges arising out of a scheme to defraud medical-insurance companies, including mail fraud, conspiracy to commit mail fraud, aiding and abetting mail fraud, and conspiracy to money launder. For the following reasons, we affirm all the appellants' convictions and sentences.

Background

As reflected by the trial evidence, physicians and medical service providers typically bill insurance companies by means of a standardized form known as a Healthcare Finance Administration (HCFA) Form No. 1500, the actual service for which a bill is submitted being designated on the HCFA Form by a Current Procedural Terminology (CPT) code, a numerical code that represents a specific service or procedure for which an insurance company will

pay on behalf of an insured.[2] On August 4, 1998, Diaz, Goldberg, Lopez, Bieganowski, and five others were charged in a twenty-three-count indictment with a series of offenses arising from a complex scheme to use these forms to defraud insurance companies. The essence of the scheme involved a conspiracy to submit bills for services that were either never performed, were known to be unneeded, or contained CPT codes that reflected a higher level of service than was actually provided.

Dr. Bieganowski began practicing medicine in Texas in 1979. By the time of his arrest in 1996, he owned five medical clinics in El Paso: El Paso Pain & Stress Clinic (EPPSC), a clinic specializing in pain management and the center of Dr. Bieganowski's medical practice; El Paso Institute of Physical Medicine & Rehabilitation (EPIPMR), a physical therapy clinic; El Paso Doctors Medical Center (EPDMC), a chiropractic clinic; and El Paso Radiology Services (EPRS), a radiology clinic. As a licensed physician and owner of the various clinics, Dr. Bieganowski was the central figure in the conspiracy, with Diaz, Lopez, and Goldberg fulfilling secondary roles. Diaz worked as a physician's assistant in Dr. Bieganowski's primary clinic, while Lopez worked as a physical therapist at the El Paso Institute of Physical Medicine & Rehabilitation. Goldberg was nominally Dr. Bieganowski's outside accountant, but actually served as the *de facto* business manager for the various businesses.

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[2] The person who signs the HCFA Form 1500 verifies that the service charged was actually delivered to a patient.

The operation of the conspiracy, as charged in the indictment, covered the period between 1989 and 1996, and can be divided into three operational stages, the first of which involved the solicitation of patients. To obtain patients, Dr. Bieganowski initially engaged a self-styled telemarketer, Richard Griego, to solicit patients for the El Paso Pain & Stress Clinic. To avoid the appearance that he was soliciting directly for Dr. Bieganowski, Griego was later employed through EPDMC, Dr. Bieganowski's chiropracty [sic] clinic. The connection, however, was only thinly veiled, as both Dr. Bieganowski and Goldberg met periodically with Griego to monitor his work, prepare scripts, and set quotas. Griego would obtain automobile accident reports from the El Paso Police Department and then use those reports to contact the accident victims by telephone. Once Griego contacted victims and referred them to EPDMC for chiropractic care, they would then be referred again to Dr. Bieganowski for further medical treatment.

The second stage of the scheme was the heart of the conspiracy and involved the creation and submission of fraudulent bills and HCFA Forms to medical insurance companies for reimbursement. The Government presented evidence of a number of fraudulent acts, including double billing, billing for services performed by Dr. Bieganowski on days when he was not in El Paso, billing for treatments known to be unneeded, billing for treatments performed by a non-physician at a physician's rate, double billing, and billing for the use of equipment that the clinic never possessed. Lopez, for example, was convicted of billing for therapy provided in a device called a Hubbard Tank, when none of Dr. Bieganowski's clinics actually possessed such a device.

The third aspect of the conspiracy involved money laundering, and the movement of the funds derived from the submission of the fraudulent HCFA Forms. In the early stages of the conspiracy, before 1994, payments from insurance companies were deposited directly into bank accounts maintained in the names of the various clinics at Norwest Bank in El Paso. After November 1994, the scheme increased in complexity and the billing operations for the various clinics were consolidated through Servicio de Facturacion y Cobranza, S.A. de C.V. (Servicio), a Mexican corporation established by Goldberg and located in Ciudad Juarez, Mexico.[3] Under the direction of Lucy Campos, Dr. Bieganowski's nominal office manager and a named co-conspirator, Servicio assumed the role of submitting bills for the clinics for reimbursement from various insurance companies. Insurance company reimbursements were then deposited into accounts held in the clinics' names at the Bank of the West in El Paso. From there Campos, the sole signator on the Servicio account, would transfer the entire amount of the reimbursements into an account held in the name of Servicio, also at the Bank of the West. Once the funds were consolidated in the Servicio account, Campos shifted those amounts necessary to cover the clinics' operating expenses back to the original clinic accounts maintained at Norwest Bank. The excess funds that remained in the Servicio account then followed the

[3] Servicio's shares were not held by Dr. Bieganowski, but were listed in the names of two Carribean corporations that were in turn owned by Dr. Bieganowski: the KART Corporation, a Cayman Island registered company, and Matrix Management Company, Inc., a British West Indies company registered in the Turks and Caicos Islands.

below described routes from the Bank of the West to Dr. Bieganowski's pocket.

A certain amount of the surplus funds held in the Servicio account was delivered directly to Dr. Bieganowski. The remainder, however, was transferred to UTM Professional Management (UTM), a shell corporation established under Goldberg's guidance, whose nominal owner and sole officer was a young college student and former nanny to Dr. Bieganowski's children. Under Goldberg's direction, the funds deposited in UTM's name were moved by means of wire transfers from UTM's account in El Paso to Barclays Bank in New York. From New York, the funds were transferred to a Barclays account held by International Medical Management, a limited partnership in the Cayman Islands, where they eventually became available for Dr. Bieganowski's personal use.

In 1994, the Federal Bureau of Investigation (FBI) along with the Internal Revenue Service (IRS) began to investigate Dr. Bieganowski's medical practice. An undercover investigation soon followed, which, together with the results of a search executed in 1996, led to the appellants' arrest in August of 1998. Shortly after his arrest, Dr. Bieganowski was diagnosed with cancer. Although incarcerated in El Paso, he began treatment and was briefly transferred to New York for medical attention. As a result of Dr. Bieganowski's condition and the volume of discovery, the case was considerably delayed, and did not proceed to trial until March 13, 2000.

A jury returned a guilty verdict on at least some counts for all four appellants. Goldberg was found guilty on two counts, conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1341 and 371, and conspiracy to money launder

in violation of 18 U.S.C. § 1956(a)(1)(B)(i), (a)(2)(B)(i), and (h). A third count against Goldberg was dismissed on the government's motion. He was sentenced to one hundred months' imprisonment on the conspiracy to money launder count and to a sixty month concurrent term on the mail fraud conspiracy count. Lopez was charged in five counts of the indictment, was convicted on two counts of mail fraud, and was acquitted on the other three counts. He was sentenced to concurrent terms of forty-one months' imprisonment and a two-year period of supervised release. Diaz was charged in two counts of the indictment. He was convicted of one count of conspiracy to commit mail fraud, and sentenced to a term of fifty-one months' imprisonment. He was acquitted on the other count. Bieganowski, the central participant in the conspiracy, was charged in fifteen of the twenty-three counts of the indictment. The jury returned a guilty verdict on ten of those counts, including nine counts of mail fraud and conspiracy to commit mail fraud, and one count of conspiracy to money launder. He was acquitted on five counts. Bieganowski was sentenced to 168 months' imprisonment.

All the defendants appeal.

Discussion

A. *Voir Dire*

Bieganowski's first argument on appeal is that the district court erred by denying him the right to voir dire certain members of the venire individually out of the hearing of the rest of the venire and in overruling his motion for

mistrial after one mentioned a prejudicial statement from a newspaper article.[4]

On the opening day of the trial, a story appeared in the *El Paso Times* reporting a number of prejudicial allegations, including allegations that Dr. Bieganowski had threatened witnesses and agents of the FBI. Six of the venire panel indicated they may have seen the article, four stating that they had read part of it. Bieganowski moved the district court to permit him to question those four panel members himself, individually and outside the hearing of the venire. The trial court denied the request and Bieganowski's counsel questioned the panel openly. Of the six panel members who reported having seen the article, two could remember nothing about it; one saw it but did not read it; one started reading it and stopped; and one simply read the headline. None of these five recalled anything "prejudicial to Dr. Bieganowski." However, venireperson Carr, when questioned by Bieganowski's counsel about the article's content, mentioned in front of the entire venire that according to the article Bieganowski "allegedly threatened witnesses, threatened to kill them." Bieganowski moved for a mistrial and the district court overruled the motion. Bieganowski then concluded his voir dire by asking the panel "is there anyone who feels that

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[4] Goldberg in his reply brief moved to adopt his co-defendant's arguments on appeal under Federal Rule of Appellate Procedure 28(i). However, he may not simply adopt Bieganowski's argument concerning voir dire as it necessarily requires reference to facts that relate only to him. *See United States v. Solis,* 299 F.3d 420, 433 n. 3 (5th Cir.2002). Goldberg does not provide any additional argument or statement showing how Bieganowski's contentions in this respect are properly applicable to him.

they could not be fair and impartial, as you sit here today, to try this case, from any source, any conversation, any news, anything." None responded. At no point did Bieganowski either seek to himself conduct further voir dire or ask the district court to conduct further voir dire or to issue supplemental instructions, nor did the district court, on its own initiative, ask further questions of the other venire members concerning either the article or Carr's statements.

In the district court's initial questioning of the venire, before the lawyers commenced their questioning of the panel, the court read the entire indictment to the panel, emphasizing that it was not evidence, and then asked if any venirepersons knew anything about the case from any other source, including the newspaper. The questions were asked row by row for each of the three rows into which the thirty-four venirepersons were divided.[5] Those who indicated they had heard or read about the case on the news or in the newspaper were asked by the court if they had formed any opinions, and the two who responded affirmatively were excused. The court then repeated that process with the following introductory comment:

> "Okay, What I need to know, the fact that you've read something in the paper, the allegations in

[5] The court introduced this questioning by stating to the venire: "The obvious question, ladies and gentlemen, is – I know some of you have read a paper. I need to know to what extent, from what you read, what you know, do any of you know anything about this case other than what I've read to you – other than what I've read to you, and that includes having read the paper. Do any of you know anything about this case, other than what I've read, only from the first row?"

> the paper, does that influence you one way or another?
>
> You're going to be asked to sit in judgment here in this court. The evidence is going to be presented by both sides. There will be witnesses here, exhibits. Now, what I need to know from you is, can you limit yourself, your deliberations, only on what is presented here, and not what's in the papers?
>
> If you've ever been involved in a situation, you know that the papers are not always correct. Okay? And that is not proof of anything, what you may have read in the papers. Any proof in this case has to come right here. It has to come here, in open court, presented by witnesses and exhibits.
>
> So I need to ask you, if you are asked to sit on this jury, can you limit yourself, no matter what you have read in the paper, to only consider the evidence that is presented here in court and no other evidence at all?"[6]

"We review a district court's determination of the scope and method of jury voir dire for abuse of discretion." *United States v. Beckner,* 69 F.3d 1290, 1291 (5th Cir.1995). The decision to permit individual questioning lies within the district court's discretion, and we will find an abuse of that discretion only "when there is insufficient questioning to allow defense counsel to exercise a reasonably knowledgeable challenge to unqualified jurors." *Id.*

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[6] As a result, one additional juror was excused who said he had "been reading about it in the papers and I will have a problem."

Questions as to the adequacy of voir dire frequently arise in situations where the trial is surrounded by significant publicity. Where a defendant claims that voir dire was inadequate given the nature of such publicity, we will reverse the conviction where the defendant can establish "(1) that pretrial publicity about the case raised a significant possibility of prejudice, and (2) that the district court's voir dire procedure failed to provide a reasonable assurance that prejudice would be discovered if present." *Beckner,* 69 F.3d at 1292.

As a threshold matter, we must determine whether the record in Bieganowski's case contains sufficient evidence of prejudice. Bieganowski introduced the article from the *El Paso Times* into evidence before the court, and there is no question but that the article was inflammatory. The reported allegations involved not simply a threat of violence, but a threat of violence directed toward witnesses in the very trial the jurors were called to hear. *See United States v. Davis,* 583 F.2d 190, 196 (5th Cir.1978) (finding prejudice where pretrial publicity included the violent background of the defendant). In addition, the publicity was contemporaneous with the start of the trial and was, therefore, fresh in the mind of at least one panel member. *Cf. United States v. Gerald,* 624 F.2d 1291, 1298 n. 3 (5th Cir.1980) (noting that impressions and memories of any publicity had necessarily diminished in the eight months between arraignment and trial); *Salemme v. Ristaino,* 587 F.2d 81, 88 (1st Cir.1978) (finding that because the trial was held five years after the prejudicial publicity, "[a]ny publicity surrounding the event had long since passed from the public's mind."). We conclude that Bieganowski has satisfied his burden in demonstrating that the record

contains sufficient pretrial publicity to raise a significant possibility of prejudice.

It remains for us to determine, however, whether the voir dire in Bieganowski's case was sufficient for Bieganowski to identify unqualified jurors. We have held repeatedly that "because jurors exposed to pretrial publicity are in a poor position to determine their own impartiality . . . district courts must make independent determinations of the impartiality of each juror." *Beckner,* 69 F.3d at 1291; *United States v. Davis,* 583 F.2d 190 (5th Cir.1978). We have also held, however, that "[w]hile examination of each juror out of the presence of the other prospective jurors is sometimes preferable, it is not necessarily required." *Beckner,* 69 F.3d at 1292.

Once Venireperson Carr revealed that he had read the prejudicial article, the district court did pose additional questions to him in the presence of the entire venire.[7] However, the district court did not thereafter question the remainder of the panel members individually about the contents of the article that they had heard Carr relate. Undoubtedly, the district court would have been better advised to have granted Bieganowski's request to conduct individual voir dire, of those who indicated they had read the particular article, outside the hearing of the panel. The court also would have been better advised to have engaged

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[7] The district court asked Carr, "Does that influence you in any way Mr. Carr? Do you understand its only a newspaper article?" Carr responded "No, it doesn't influence me a bit." The court continued: "Do you understand that, as I've mentioned previously, all of the evidence is going to have to be presented in the court? What the newspaper says has nothing to do with this trial." Carr responded, "Absolutely."

in further questioning of the entire venire after Carr's statement in the presence of the panel about the contents of the article. Equally important, however, is Bieganowski's failure to request such additional questioning by the court (or otherwise). We must ask, therefore, whether the district court's failure to conduct individual voir dire after Carr's statement, in the absence of that failure being brought to the court's attention, so affected Bieganowski's substantial rights as to merit reversal. *See* Fed.R.Crim.P. 52(b). We conclude that it did not.

Carr, the only panel member who had actually read the article, did not ultimately serve on the jury (the defense did not challenge Carr for cause but exercised a peremptory strike to remove him).[8] To say that Carr never served on the jury, however, does not answer the charge that his statements prejudiced the entire venire. Nevertheless, three additional observations indicate that the venire was not infected with such a degree of prejudice as to require reversal in the present setting. First, as above indicated, the district court had previously strongly instructed the venire not to consider what they had read in the papers and that "the papers are not always correct," and in the presence of the venire openly instructed Carr, after his mention of what the article stated, that "what the newspaper says has nothing to do with this trial" (see note 7 above). And at the conclusion of voir dire the court instructed the panel that "anything you may have seen or heard outside the courtroom is not evidence and must be totally disregarded. You are to decide this case solely on

[8] Nor did any of the other venire members who recalled anything about the article serve on the jury.

the evidence presented here in court." Second, the jury returned a guilty verdict on only ten of the fifteen counts of the indictment charging Bieganowski, acquitting him of the other five, indicating that the jury methodically assessed each of the charges against him. Third, the prosecution presented overwhelming evidence of Bieganowski's guilt at trial. Thus, in light of the volume of evidence against him and Bieganowski's failure to request individual voir dire by the court (or otherwise) after venireperson Carr's statement about the article, and the district court's overall handling of the voir dire, we decline to hold that the court's failure to engage in such individual questioning amounted to a deprivation of Bieganowski's substantial rights.

B. *Sufficiency of the Evidence*

1. Lopez: Mail Fraud

Both Lopez and Goldberg challenge the sufficiency of the evidence to sustain their convictions. We address both Lopez's and Goldberg's arguments in turn.

Lopez was convicted on two counts of mail fraud for submitting HCFA Forms that reflected the use of a physical-therapy device known as a Hubbard Tank.[9] Although Lopez concedes that none of Dr. Bieganowski's clinics ever contained a Hubbard Tank, he maintains that the evidence failed to show either that billing for a Hubbard Tank

[9] Stedman's Medical Dictionary defines a Hubbard Tank as a large tank, usually filled with warm water, used for therapeutic exercises in a program of physiotherapy. *See* STEDMAN'S MEDICAL DICTIONARY 1785 (27th ed.2002).

was a material misstatement or that he possessed the requisite intent to commit mail fraud.

"The standard of review in assessing a challenge to the sufficiency of the evidence in a criminal case is whether a 'reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt.'" *United States v. Smith,* 296 F.3d 344, 346 (5th Cir.2002). In evaluating the evidence, we view "all evidence and all reasonable inferences drawn from it in the light most favorable to the government." *Id.* (quoting *United States v. Mergerson,* 4 F.3d 337, 341 (5th Cir.1993)). "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States v. Henry,* 849 F.2d 1534, 1536 (5th Cir.1988); *United States v. Lechuga,* 888 F.2d 1472, 1476 (5th Cir.1989). However, in a case depending on circumstantial evidence if "the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," a defendant is entitled to a judgment of acquittal. *United States v. Brown,* 186 F.3d 661, 664 (5th Cir.1999) (quoting *United States v. Schuchmann,* 84 F.3d 752, 754 (5th Cir.1996)).

Lopez was ultimately convicted on two counts of mail fraud in violation of 18 U.S.C. § 1341. To prove mail fraud under 18 U.S.C. § 1341, the government must show: (1) a scheme to defraud; (2) the use of the mails to execute the scheme; and (3) the specific intent to defraud. *United States v. Peterson,* 244 F.3d 385, 389 (5th Cir.2001). In addition, the Supreme Court has interpreted section 1341 to require that the misstatement made in the course of the scheme to defraud be a material one. *See Neder v. United*

States, 527 U.S. 1, 119 S.Ct. 1827, 1841, 144 L.Ed.2d 35 (1999).

Lopez argues that billing for Hubbard Tank treatment could not have been a material misstatement since the billing rate for the use of a Hubbard Tank was lower than the rate at which Lopez could have billed for the treatment that he actually delivered. Specifically, Lopez maintains that although he submitted bills with CPT code 97220, the code for Hubbard Tank treatment, he could have billed under the more expensive CPT code 97420, the code used for supervised pool therapy or Hubbard Tank therapy with exercises.[10]

On closer examination, however, Lopez's argument fails. First, the evidence indicates that billing for Hubbard Tank therapy includes not only a representation that the clinic possessed a Hubbard Tank, but also the implicit representation that the Tank was used to deliver certain professional services. The evidence further indicated that a

[10] In 1994, Lopez did cease billing for Hubbard Tank treatments and began billing instead, under CPT code 97420, for pool therapy at the same $35 per-half-hour rate that he had previously billed for Hubbard Tank therapy. Simply because Lopez could have billed for the services at the same rate, however, does not mean that the misstatement was immaterial or that the insurance companies reimbursed for the services at the same rate or at the same frequency. The record, for example, contains conflicting evidence regarding whether the insurance companies, at the time Lopez was billing for Hubbard Tank treatments, actually reimbursed at a higher rate for pool therapy than they did for Hubbard Tank therapy. In any event, it is unnecessary to reconcile this conflicting evidence as the evidence also showed that Lopez could not have billed for pool therapy without making a further misstatement, and that billing for Hubbard Tank therapy was itself a material misstatement.

physical therapist may only bill for pool therapy under CPT code 97420 where the therapy is supervised. Ample evidence, however, was introduced to establish that such supervision was lacking in Lopez's clinic, and that no professional services were being provided to Lopez's patients while they were in the clinic's pools.[11]

Lopez's defense that he could have billed for the services he provided as pool therapy under CPT code 97420, therefore, is unsupported by the evidence. Lopez's argument essentially amounts to the claim that his misrepresentation was not material since, by making an additional misrepresentation, he could have charged for a different service at an equal or higher rate. We find this reasoning unconvincing.

Moreover, there was at least some evidence presented that insurance companies found the representation that the clinic possessed a Hubbard Tank to be material regardless of any actual charges billed. Lisa Hannusch, an expert witness from the Texas Workers Compensation Insurance Fund, testified that in order for the Fund to pay a bill for a Hubbard Tank, the clinic submitting the bill must actually have a Hubbard Tank. Hannusch also testified that had she known that there was no such tank at Lopez's clinic, she would not have reimbursed his bills. Finally, Hannusch testified that a pool such as Lopez's – a pool used to treat multiple individuals, with no window access, no aide present, and no physical therapist available to supervise

[11] Two former patients and a former assistant of Lopez's testified that there were three to six people in the clinic whirlpools at a time and that they received no supervision or physical-therapy instruction while they were in the pool.

the patients – would not be billable as a Hubbard Tank or as pool therapy.

We also find that the evidence supported the jury's finding that Lopez possessed the requisite intent to defraud. Lopez was active in selecting billing codes, he adjusted the billing codes submitted by other employees, and at least on one occasion, he received and annotated billing statements from insurance companies. When viewed in the light most favorable to the verdict, we find this evidence sufficient to support the conclusion that Lopez intended to submit bills containing material misstatements to the insurance companies for reimbursement.

After reviewing the record, therefore, we find that the evidence is sufficient to establish both that billing for a Hubbard Tank was a material misstatement and that Lopez possessed the requisite intent to support his conviction for mail fraud.

2. Goldberg: Mail Fraud

Goldberg also challenges the sufficiency of the evidence to support his convictions. Goldberg was convicted on one count of conspiracy to commit mail fraud and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956. Goldberg makes the related arguments that the evidence failed to show that he possessed the requisite intent to commit mail fraud, and that since the offense of money laundering requires knowledge that the laundered funds are the proceeds of unlawful activity, he can therefore be found guilty neither of mail fraud nor money laundering. In addition, Goldberg maintains that the Government failed to prove that the funds transferred to

the Cayman Islands were the proceeds of unlawful activity.

A section 371 conspiracy comprises the following elements: (1) an agreement between the defendant and a co-conspirator to violate a law of the United States; (2) an overt act by one conspirator in furtherance of the conspiracy; and (3) the specific intent to further an unlawful objective of the conspiracy. *United States v. Sharpe,* 193 F.3d 852, 863 (5th Cir.1999). The requirement of an agreement is the central element and the agreement, therefore, must be arrived at knowingly. *United States v. Holcomb,* 797 F.2d 1320, 1327 (5th Cir.1986); *United States v. Ballard,* 663 F.2d 534, 543 (5th Cir.1981). "[M]ere association with those involved in a criminal venture is insufficient to prove participation in a conspiracy." *Id.; United States v. Alvarez,* 610 F.2d 1250, 1255 (5th Cir.1980), *aff'd* 625 F.2d 1196 (5th Cir.1980) (*en banc*). The existence of an agreement, however, may be proved by circumstantial evidence, *see Holcomb,* 797 F.2d at 1327, and even minor participation in the conspiracy may serve as the basis for a conviction. *United States v. Prieto-Tejas,* 779 F.2d 1098, 1103 (5th Cir.1986). Moreover, in a conspiracy case: "[a]n agreement may be inferred from 'concert of action,'" "[v]oluntary participation may be inferred from 'a collocation of circumstances,'" and "[k]nowledge may be inferred from 'surrounding circumstances.'" *United States v. Lechuga,* 888 F.2d 1472, 1476-77 (5th Cir.1989).

Inasmuch as the circumstantial evidence in this case tends to prove that Goldberg knew that Dr. Bieganowski's clinics were engaged in fraudulent billing practices, we conclude that there was sufficient evidence to establish Goldberg's participation in the conspiracy. Goldberg's affiliation with Dr. Bieganowski's practice far exceeded the limits of an

ordinary professional relationship, and involved him in nearly every aspect of the operation of the clinics. He spent almost every afternoon at Dr. Bieganowski's clinic and attended multiple meetings with the clinic staff, including meetings addressing such mundane administrative matters as employee dress codes. The evidence supports the conclusion that he was the *de facto* business manager of Dr. Bieganowski's practice, with day to day supervision of and extensive familiarity with it. The fraudulent billing practices were widespread, pervasive and virtually continuous throughout the clinics. From an internal perspective, they were neither concealed nor secret.

A portion of the Government's conspiracy case also involved allegations that Dr. Bieganowski's clinics knowingly obtained authorization for, provided, and billed for unnecessary services, including an expensive procedure known as a facet block injection. Although Goldberg maintains on appeal that he was not involved in the mechanics of creating bills or demanding payment, the record indicates that Goldberg was involved with efforts to obtain certification from insurance companies for these treatments. For example, he closely monitored those employees who were responsible for obtaining precertification for facet block injections, and he directed that the precertification quota for injections be increased, first from ten to fifteen patients per day, and later to twenty patients per day. An employee responsible for the precertification of injections, Rene Moreno, testified that when she told Goldberg that patients were reluctant to receive the injections, Goldberg instructed her to do whatever was necessary to get the patients to the hospital. Although this evidence does not prove that Goldberg knew that any

particular, single injection was not medically necessary, or that a particular precertification request contained fraudulent representations, it illustrates the extent to which Goldberg was involved in the preparation and submission of bills. More important, it, together with the other evidence, tends to support an inference that Goldberg knew that some bills contained fraudulent representations.

The record also indicates that Goldberg was closely involved with Dr. Bieganowski's solicitation efforts. He not only attended meetings with Robert Griego, Bieganowski's telemarketer, but also reviewed the script that Griego used to solicit new patients. Goldberg knew that Griego told reluctant patients that they could increase their automobile-insurance settlements by generating higher medical bills, and he knew that Griego advised patients to obtain medical examinations even when those same patients told Griego that they were not injured. More important, when Griego suggested to Goldberg that Griego might have to begin staging accidents in order to meet his quota, Goldberg simply responded: "Well, you know, whatever you have to do."

Also damaging to Goldberg's protestations of ignorance was the testimony of Rosa Cordova and Lucy Campos. Campos testified that she had given Goldberg a copy of the Medical Fee Guidelines, a manual that contained the various CPT billing codes, further undermining Goldberg's claim that he was not involved with creating bills. Cordova, an employee in the precertification department, testified that Dr. Bieganowski had directed her to generate false fee tickets and to submit fee tickets even when patients had left without being treated. When asked about how much Goldberg knew about her activities, Cordova

replied, "[Goldberg] knew exactly what my job was and he wanted to make sure that I was doing it."

Further, Goldberg's extensive efforts in setting up and overseeing an elaborate virtual labyrinth of bank accounts for Dr. Bieganowski's clinics, which concealed both the clinics' and Dr. Bieganowski's relationship to the accounts and the ultimate disposition of the funds, is plainly suggestive of guilty knowledge. Goldberg correctly points out that each piece of evidence against him, viewed separately, may admit of an innocent explanation. That, however, is not determinative. As we observed in *Lechuga,* 888 F.2d at 1476: "the United States Supreme Court remarked long ago, '[c]ircumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.' *Coggeshall v. United States (the Slavers, Reindeer),* 69 U.S. (2 Wall.) 383, 17 L.Ed. 911, 914-15 (1864)." Thus, although no individual piece of evidence against Goldberg is dispositive, taken together the evidence as a whole suffices to establish an adequately clear picture of Goldberg's role in the conspiracy. The cumulative effect of this evidence is sufficient to support the inference that Goldberg was aware of the fraudulent billing practices, and we therefore decline to hold that the evidence was insufficient to support Goldberg's conviction for conspiracy to commit mail fraud.

3. Goldberg: Money Laundering

For his role in the conspiracy, Goldberg was also convicted of conspiracy to money launder in violation of 18 U.S.C. § 1956(h). The substantive offense of money laundering

requires that the defendant knew that the funds in question represented the proceeds of unlawful activity. *See United States v. Burns,* 162 F.3d 840, 847 (5th Cir.1998). Goldberg maintains that since he did not know that Bieganowski's clinics were submitting fraudulent claims, he could not have known that the funds deposited into the various clinic accounts represented the proceeds of unlawful activity, and that he therefore cannot be found guilty of money laundering. Because we find that the evidence supports the conclusion that Goldberg was aware that the reimbursements from the insurance companies represented the proceeds of fraudulent billing practices, *see* section II(B)(2), *supra,* we reject this argument.

Finally, we address Goldberg's claim that the Government failed to prove that the funds transferred to the Cayman Islands in fact represented the proceeds of unlawful activity. In this case, the indictment charged a conspiracy to commit two types of money laundering: (1) engaging in a financial transaction designed to conceal the source or control of the proceeds of unlawful activity in violation of section 1956(a)(1)(B)(i), and (2) transporting or attempting to transport funds from a place in the United States to a place outside the United States in order to conceal the source or control of the proceeds of unlawful activity, in violation of section 1956(a)(2)(B)(i).

The offense of money laundering under section 1956(a)(1)(B)(i), requires that the government prove that the defendant: (1) conducted or attempted to conduct a financial transaction, (2) that the defendant knew involved the proceeds of unlawful activity, and (3) that the defendant knew was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity. 18 U.S.C. § 1956(a)(1)(B)(i); *United*

States v. Burns, 162 F.3d 840, 847 (5th Cir.1998), *cert. denied, August v. United States,* 526 U.S. 1076, 119 S.Ct. 1477, 143 L.Ed.2d 560 (1999). An offense under section 1956(a)(2)(B)(i) is almost identical, with the exception that the transaction in question must be from a place in the United States to a place outside the United States. *See* 18 U.S.C.A. § 1956(a)(2)(B)(i).

Agent Hivic of the IRS testified that between November, 1994,[12] and January, 1997, over six million dollars of insurance company reimbursements were deposited in the various clinics' accounts. All of that six million dollars was then transferred from the clinics' accounts at the Bank of the West to the Servicio account, also located at the Bank of the West. Of that six million dollars, a little over two million was eventually transferred to the Cayman Islands.

Goldberg's argument proceeds from the premise that the Government failed to prove that *all* of Dr. Bieganowski's billings were fraudulent. If *some* billings were legitimate, then at least *some* of the money that was deposited into the clinic accounts at the Bank of the West and then consolidated in the Servicio account was also legitimate. Consequently, Goldberg maintains that the Government never established that Bieganowski earned less than two million dollars through legitimate billing and that the Government cannot, therefore, prove that the funds transferred to the Cayman Islands were the proceeds of fraudulent activity. The government maintains that it

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[12] November, 1994, represents the date on which Goldberg consolidated Dr. Bieganowski's billing operations in Servicio, a Mexican corporation located in Ciudad Juarez, Mexico.

produced sufficient evidence that all the funds deposited to the Servicio account – and certainly more than four million dollars thereof – were the product of fraudulent billings. The government also argues that if some funds in the Servicio account were legitimate their commingling with illegitimate funds there allows treatment of the Cayman Island funds as illegitimate.

Accepting, *arguendo*, Goldberg's position as valid – that the Government failed to establish that the funds transferred to the Cayman Islands were illegitimate – this failure does not undermine Goldberg's conviction. The Government charged Goldberg with a conspiracy to violate both section 1956(a)(1)(B)(i) and (a)(2)(B)(i), and the jury charge authorized conviction upon either theory.[13] Goldberg's argument concerning the funds transferred to the Cayman Islands, if valid, would only undermine a conviction based on a conspiracy to commit money laundering under section 1956(a)(2)(B)(i), laundering by transferring illegitimate funds out of the United States. The evidence to support a conviction for section 1956(a)(1)(B)(i), on the other hand, was more than sufficient.

The indictment and the jury charge include a series of overt acts tracing the entire money laundering operation, including the transfer of funds involving the proceeds of unlawful activity from the clinics' accounts at the Bank of the West to Servicio's bank account. That transfer to Servicio alone satisfies the requirements of section 1956(a)(1)(B)(i). The entire six million dollars deposited

[13] No objection to the change on this basis has been raised on appeal.

into the clinics' accounts was thereafter transferred to the Servicio account. Therefore, even assuming that the Government only proved that a portion of those six million dollars represented the proceeds of fraudulent activity, the prosecution nevertheless satisfied its burden of demonstrating that the transfer involved the proceeds of specified unlawful activity. *See* 18 U.S.C. § 1956(a)(1). There is also little doubt that the transfers from the clinics' accounts to the Servicio account were designed to conceal the source of the unlawful funds. A casual observer would not have immediately linked the contents of the Servicio account to Bieganowski as neither Dr. Bieganowski nor Goldberg were listed as shareholders (or officers or directors or authorized agents or account signatories) of Servicio. *See United States v. Willey,* 57 F.3d 1374, 1387-89 (5th Cir.1995) (noting that a transfer from one third party to another supports an inference of a design to conceal).

Because the jury could have convicted Goldberg for conspiracy to violate 18 U.S.C. § 1956(a)(1)(B)(i), and because the evidence supports a finding that the transfers from the clinic's accounts to Servicio involved the proceeds of unlawful activity and were designed to conceal the source of those proceeds, we hold that the evidence is adequate to sustain Goldberg's conviction for conspiracy to money launder.

C. *Speedy Trial*

Lopez argues that the indictment should have been dismissed for undue delay under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, and that the eventual delay between

his arrest and trial violated his right to a speedy trial under the Sixth Amendment.[14] We turn first to the Speedy Trial Act claim. We review factual findings under the Speedy Trial Act (the Act) for clear error, and legal conclusions *de novo. United States v. Narviz-Guerra,* 148 F.3d 530, 538 (5th Cir.1998).

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[14] Goldberg, in his reply brief, purports to generally adopt all issues raised by other appellants to the extent not fact specific or inconsistent with issues presented in his brief. It is not entirely clear that he may do so. Federal Rule of Appellate Procedure 28(i) provides that

> "[i]n cases involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs."

Fed. R.App. P. 28(i).

This Circuit has previously permitted a party to adopt an argument by reference in a reply brief, but did so under the discretion granted by Federal Rule of Appellate Procedure 2, and under the reasoning that it would be "anomalous to reverse some convictions and not others when all defendants suffer from the same error." *See United States v. Gray,* 626 F.2d 494, 497 (5th Cir.1980). No case in this circuit directly addresses the issue of whether Rule 28(i) permits a party to adopt an issue in a reply brief. The Second Circuit has rejected this position, holding that where an issue is not raised on appeal in an initial brief, it is waived unless it would result in substantial injustice. *NLRB v. Star Color Plate Service,* 843 F.2d 1507, 1510 n. 3 (2d Cir.1988). The Sixth Circuit, on the other hand, appears to allow this practice, but does not clarify whether it is a practice grounded in Rule 28(i). *See United States v. King,* 272 F.3d 366, 371 (6th Cir.2001).

Since we affirm all the defendant's convictions, permitting Goldberg to adopt his co-appellant's arguments would make no difference in the outcome of his case and would not create the anomaly that motivated us in *Gray*. We, therefore, find it unnecessary to resolve this issue today.

The Act requires that a defendant be brought to trial "within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). Where a defendant is not brought to trial within this period, the indictment must be dismissed. *Id.* § 3161(a)(2).

Under section 3161(h), however, certain delays are excluded from the calculation of the seventy-day limit, including

> "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(8)(A).

Section 3161(h) also excludes a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." *Id.* § 3161(h)(7). Thus, the Act excludes from the calculation of the seventy-day limit any delay resulting from the proper grant of a continuance requested by a co-defendant. *United States v. Bermea,* 30 F.3d 1539, 1567 (5th Cir.1994) ("[T]he excludable delay of one defendant may be attributed to *all* defendants.").

It is undisputed that the seventy-day period in the case *sub judice* began on August 5, 1998, the date of the appellants' arrest and arraignment, and that the trial began

one-and-a-half years later on March 13, 2000. From August 5, 1998, the date of the appellants' first appearance, until October 2, 1998, the trial court found that only twenty-three days expired on the speedy trial clock. Lopez does not dispute this calculation. Lopez also concedes that the entire time from October 2, 1998, until the first trial setting for February 22, 1999, was properly excluded from the seventy-day limit. Only at issue on appeal, therefore, are three orders continuing the trial past February 22, 1999. The first continuance, granted on February 11, 1999, and followed by a written order issued on February 12, 1999, continued the trial until August 23, 1999. The second issued on August 12, 1999, when the district court set the case for trial on November 1, 1999; the third was granted on September 2, 1999, memorialized in an order on October 5, 1999, and set the trial for March 13, 2000. We examine each continuance in turn. Although the Act excludes from the seventy-day limit the period of a continuance, such period is only excluded where the court "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). Lopez argues on appeal that the district court failed, on each of the three occasions listed above, to engage in an ends-of-justice analysis or to state adequately its reasons for granting the three continuances.

Lopez's assertion with respect to the February 11, 1999, continuance is patently unsound. The district court's February 12th order clearly satisfied the requirement of section 1361(h)(8) that the court articulate reasons recognized under the Act for granting a continuance. Section

1361(h)(8)(B) sets forth a number of grounds that a court shall consider in granting a continuance, including "[w]hether the case is so unusual or so complex . . . that it is unreasonable to expect adequate preparation . . . within the time limits established by this section." *Id.* § 3161(h)(8)(b)(ii). The district court's order not only explicitly referenced subsections 3161(h)(8)(B)(i) and (ii), but also described the case as "unusual and complex." Moreover, the order stressed that because of Dr. Bieganowski's illness and the high volume of discovery, the continuance was necessary to permit Bieganowski to assist his attorney to prepare for trial.[15]

Lopez's claim that the district court failed to perform the required ends-of-justice analysis on August 12, 1999, when it continued the case until November 1, 1999, however, has some arguable merit. The record of the August 12th hearing contains reference neither to the ends-of-justice nor to the complexity of the case. The district court, however, had previously designated the case as complex, and the record of the August 12th hearing contains

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[15] The district court, on a number of occasions, designated this case as complex. That designation, and the decision to grant a continuance based on the volume of discovery, are consistent with cases interpreting section 3161(h)(8). *See, e.g., United States v. Dota,* 33 F.3d 1179, 1183 (9th Cir.1994) (finding that "[a]n ends-of-justice continuance may be justified on grounds that one side needs more time to prepare for trial"); *United States v. Wellington,* 754 F.2d 1457, 1467 (9th Cir.1985) (upholding the complexity of a mail fraud prosecution as a proper ground for the granting of a continuance); *United States v. Chalkias,* 971 F.2d 1206, 1211 (6th Cir.1992) (upholding the grant of a continuance based on the complexity of an interstate cocaine conspiracy); *United States v. Thomas,* 774 F.2d 807, 811 (7th Cir.1985) (upholding an ends-of- justice continuance based on the complexity of a fraud case with numerous defendants and thousands of financial documents).

repeated reference to both the volume of discovery and the numerous logistical constraints on Dr. Bieganowski's ability to cooperate in his defense.

We decline to decide, however, whether the August 12th continuance satisfied the requirements of the Act. Even if the August 12th order failed to stop the clock, the September 2, 1999, continuance did. In its order of October 5, 1999, memorializing the September 2, 1999, continuance, the district court found, after "giving all due consideration to the interest of the public and the defendants to a speedy trial and to the Constitutional rights of [the] defendants . . . that the ends of justice are served by continuing the . . . action." In addition, the district court in that same order again entered a finding that the case was complex due to the number of defendants and the nature of the prosecution.[16] Between August 23, 1999, the date for which trial was set in the February 12th order, and September 2, 1999, only another ten days expired on the speedy trial clock, bringing the total number of expired days to thirty-three, and well below the seventy days mandated by the Act.

Finally, Lopez presents two additional arguments in support of his Speedy Trial Act claim. First, Lopez maintains that the district court's October 5, 1999, order does not constitute a contemporaneous finding as required by the Act. Second, he contends that the delay of the trial until March 13, 2000, even if supported by the requisite

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[16] This order appears at page 662 of Volume 3 of the record on appeal. Though it arguably was filed in the wrong volume (or not in all the volumes it should have been) of the record on appeal it is properly before us.

findings, was not reasonable. We reject both of these arguments.

In arguing that the Speedy Trial Act requires contemporaneous findings to support an ends-of-justice continuance, Lopez mistakenly relies on language from this Court's decision in *United States v. Blackwell,* 12 F.3d 44, 48 (5th Cir.1994) ("In the absence of contemporaneous, articulated on-the-record findings for extending the time for trial past seventy days . . . Defendant-Appellant is entitled to have his case dismissed."). The word "contemporaneous" in *Blackwell* upon which Lopez relies, however, was dicta. *See United States v. Jones,* 56 F.3d 581, 585 n. 9 (5th Cir.1995). Moreover, we declined in *Jones* to elevate *Blackwell*'s statement about contemporaneity to the status of a rule of law, noting instead that "virtually every Circuit has held that the *entry* of findings after granting the continuance is not reversible error so long as the findings were not actually *made* after the fact." *Id.* Today, we adopt the position toward which we moved in *Jones* and reject the *Blackwell* dicta. Rather than contemporaneous findings, section 3161 merely requires that a district court enter on the record, at some point (presumably prior to trial), the necessary findings to support an ends-of-justice continuance. *Id.* The only requirements for such an order are that the order memorializing the continuance indicate when the motion was granted, and that the reasons stated be and can be fairly understood as being those that

actually motivated the court at the time it granted the continuance. *Id.* Those conditions are clearly met here.[17]

Finally, turning to the reasonableness of the delay, we first note that the nineteen-month delay between Lopez's arrest and trial was substantial. We decline to hold, however, that such a delay was unreasonable under the circumstances.

Section 3161(h)(7) provides for the exclusion from the seventy-day speedy trial period of a "reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7). Given the fact-intensive nature of the reasonableness inquiry, we review subsection (h)(7) exclusions on a case-by-case basis, *United States v. Franklin,* 148 F.3d 451, 457 (5th Cir.1998), and examine both the totality of the circumstances of the case prior to trial and the "actual prejudice suffered by the appellant as a result of the subsection (h)(7) exclusion." *Id.* In examining the totality of the circumstances of the case, our inquiry focuses on the necessity of the delay, giving proper consideration "to the purpose behind subsection (h)(7) – 'accommodating the efficient use of prosecutorial and judicial resources in trying multiple defendants in a single trial.'" *Id.* In weighing prejudice, on the other hand, "relevant considerations include whether the delay impaired the

[17] We do not address whether some extreme delay coupled with special circumstances strongly suggesting that the reasons stated later are not really those that motivated the continuance might produce a different result. Nothing of that kind is present here.

appellant's ability to defend himself or resulted in excessive pretrial incarceration." *Franklin,* 148 F.3d at 457.

Neither prong of our subsection (h)(7) analysis supports the conclusion that Lopez's delay was unreasonable. The trial in this case followed almost four years of investigative work, involved thousands of medical and financial documents, and lasted nearly two months. To have tried Lopez separately would necessarily have involved a substantial additional expenditure of judicial and prosecutorial resources. Nor does the record indicate that the delay in any way impaired Lopez's ability to defend himself. Finally, the delay did not result in excessive incarceration as Lopez remained free on bond during the pendency of his trial.

In addition to his Speedy Trial Act claim, Lopez also alleges a violation of his Sixth Amendment right to a speedy trial. "The Sixth Amendment guarantees that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.'" *United States v. Neal,* 27 F.3d 1035, 1042 (5th Cir.1994). It will be the unusual case, however, where the time limits under the Speedy Trial Act have been satisfied but the right to a speedy trial under the Sixth Amendment has been violated. *See United States v. O'Dell,* 247 F.3d 655, 666-67 (6th Cir.2001); *United States v. Munoz-Amado,* 182 F.3d 57, 61 (1st Cir.1999); *United States v. Nance,* 666 F.2d 353, 360 (9th Cir.1982). Lopez's case is no exception.

In analyzing a Sixth Amendment speedy trial claim, we balance, among other relevant circumstances, (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant timely asserted his right; and (4) any prejudice resulting to the defendant because of the

delay. *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 2192-93, 33 L.Ed.2d 101 (1972). Here, the Government concedes that the delay was substantial enough to trigger the remaining *Barker* factors, and that Lopez timely asserted his rights. Our focus, therefore, must be on the remaining two factors of the *Barker* test.

In assessing the reasons for the delay, we observe at the outset that "pretrial delay is often both inevitable and wholly justifiable." *Doggett v. United States,* 505 U.S. 647, 112 S.Ct. 2686, 2693, 120 L.Ed.2d 520 (1992). We also recognize that the extent to which this observation rings true will necessarily vary with the complexity of the case. Thus, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge" such as the one in which Lopez found himself enmeshed. *Barker,* 92 S.Ct. at 2192-93. This was a complex case, and we hesitate to say that the reasons for the delay were unreasonable. The volume of discovery and the number of defendants involved justified some delay, as did Dr. Bieganowski's illness and consequent inability to assist in his defense. Moreover, Lopez has not demonstrated that the delay was occasioned by the prosecution, or that the "government . . . intentionally held back in its prosecution . . . to gain some impermissible advantage at trial." *Neal,* 27 F.3d at 1043 (quoting *Doggett v. United States,* 505 U.S. 647, 112 S.Ct. 2686, 2693, 120 L.Ed.2d 520 (1992)).

In the final step of the *Barker* calculus, we examine the degree of prejudice that attached to Lopez because of the delay and find that insofar as Lopez fails to make a convincing show of prejudice, this remaining *Barker* factor also weighs heavily against him. Lopez argues that as a result of the delay, he suffered "psychological and economic

prejudice," and that the Government gained additional time for its expert to review certain documents. During the period of the delay the Government did uncover additional documentary evidence that supported the charges against Lopez. Specifically, the Government located additional bills for Hubbard Tank treatments that included Lopez's handwritten signature. Lopez, however, was acquitted on two Hubbard Tank charges and does not demonstrate that these newly discovered billing records were the ones used to support the charges for which he was ultimately convicted. Moreover, since the Government already had documentary evidence of numerous bills that bore Lopez's signature stamp, it is difficult to see how these additional documents resulted in prejudice. Lopez's claims of psychological and economic strain are also insufficient to establish the prejudice necessary to find a violation of his Sixth Amendment rights. The Sixth Amendment is concerned with "reducing the 'anxiety and concern of the accused.'" *Cowart v. Hargett,* 16 F.3d 642, 647 (5th Cir.1994). "Anxiety about one's reputation and private life during pretrial delay, however, will not alone suffice to warrant a reversal of a conviction." *Id.* Consequently, we find that Lopez did not suffer a degree of prejudice sufficient for us to find a violation of his Sixth Amendment rights.[18]

[18] We note that it would be a strange (albeit perhaps not impossible) result were we to find that prejudice existed under the Sixth Amendment speedy trial analysis where we had already concluded that a delay was reasonable under subsection (h)(7) of the Speedy Trial Act.

D. *Sufficiency of the Indictment*

Lopez also raises a challenge to the sufficiency of the indictment, arguing that those counts of the indictment charging him with representing that the clinic possessed a Hubbard Tank were insufficient to support an inference of materiality.[19]

We review the sufficiency of an indictment *de novo*. *United States v. Fitzgerald,* 89 F.3d 218, 221 (5th Cir.1996). To be sufficient, an indictment must conform to minimal constitutional standards, *United States v. Threadgill,* 172 F.3d 357, 373 (5th Cir.1999), standards that are met where the indictment alleges every element of the crime charged and in such a way "as to enable the accused to prepare his defense and to allow the accused to invoke the double jeopardy clause in any subsequent proceeding." *Id.* (quoting *United States v. Webb,* 747 F.2d 278, 284 (5th Cir.1984)).

Where the government charges a defendant with mail fraud, it must prove the materiality of the fraudulent statement as an element of the offense. *See Neder v. United States,* 527 U.S. 1, 119 S.Ct. 1827, 1841, 144 L.Ed.2d 35 (1999). The failure to employ the word "material" in the language of the indictment, however, is not fatal. *See United States v. Richards,* 204 F.3d 177, 191 (5th Cir.2000) ("In determining the sufficiency of the indictment, '[t]he law does not compel a ritual of words.'"

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[19] Bieganowski, by way of adopting Lopez's arguments pursuant to Federal Rule of Civil Procedure 28(i), raises an identical challenge to the sufficiency of the indictment. We reject that challenge for the same reasons that we reject Lopez's.

(quoting *United States v. Wilson,* 884 F.2d 174, 179 (5th Cir.1989))). Instead, an allegation of fraud in an indictment will be sufficient so long as "the facts alleged in the indictment warrant an inference that the false statement is material." *United States v. McGough,* 510 F.2d 598, 602 (5th Cir.1975).

Lopez's argument here largely mirrors his challenge to the sufficiency of the evidence to support his conviction.[20] The misstatement charged against Lopez in this case was the submission of bills representing that patients received physical therapy in a Hubbard Tank, when, in fact, the clinic never possessed such a device.[21] Lopez argues that because the billing rate for the therapy that was actually provided was the same as the billing rate that would have been charged had the therapy been provided in a Hubbard Tank, the misstatement that a Hubbard Tank was used could not have been material. His real argument, however, is that at trial the Government did not focus on the false statement alleged in the indictment, that the clinic employed a Hubbard Tank, but instead argued that the bills

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[20] *See* section II(B)(1), *supra.*

[21] The relevant language in Counts Two and Five of the indictment reads:

> "Defendants knowingly devised and attempted to devise a scheme and artifice to defraud . . . [and] did knowingly cause to be sent, delivered and moved by the United States Postal Service, according to the directions thereon, a HCFA 1500s falsely and fraudulently representing . . . that a patient, G.H., had received physical therapy using a Hubbard Tank, . . . when the Defendant knew that no Hubbard tank was used."

were fraudulent because they misstated the degree of supervision the patients were given while in therapy.

The flaw in Lopez's argument lies in his failure to distinguish between a challenge to the sufficiency of the indictment and a challenge to the evidence produced at trial. *See, e.g., United States v. McGough,* 510 F.2d 598, 603 (5th Cir.1975) (holding that an indictment "need only allege materiality 'in substance,'" and warning against the failure to "draw a clear distinction between an allegation of materiality and proof of materiality."). In determining whether an allegation of materiality in an indictment is sufficient, the proper inquiry is whether the allegation is "potentially capable of being proved material by the government at trial," and whether the allegation is sufficient to support an inference of materiality. *Id.* at 602. Accordingly, it would be inappropriate to test the validity of the indictment from the perspective of the evidence eventually produced at trial. That the Government produced proof demonstrating that Lopez did not provide individualized supervision to his patients has no bearing on the issue of whether the indictment provided Lopez with notice that the Government intended to, and eventually did, prove that the bills submitted for Hubbard Tank therapy were fraudulent.

The allegation in the indictment that Lopez committed fraud by falsely describing his services as including the use of a Hubbard Tank formed a sufficient basis from which Lopez could infer that the Government would attempt to prove that such a misstatement was material. The indictment, therefore, satisfied minimal constitutional standards and we find Lopez's argument to be without merit.

E. *Constructive Amendment*

Lopez also maintains that the district court permitted the Government to constructively amend the indictment. Lopez first raised this issue in a Rule 34 motion for Arrest of Judgment.[22] The district court ruled that Lopez's claim was not cognizable under Rule 34. Lopez attempts to bring this claim within the purview of Rule 34 by casting the alleged amendment as a jurisdictional defect. Since the Supreme Court's decision in *United States v. Cotton,* however, it is clear that "defects in an indictment do not deprive a court of its power to adjudicate a case." 535 U.S. 625, 122 S.Ct. 1781, 1785, 152 L.Ed.2d 860 (2002), *overruling Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887); *see also United States v. Longoria,* 298 F.3d 367, 372 (5th Cir.2002). A claim of constructive amendment, then, is not the equivalent of a charge of a jurisdictional defect. Lopez, therefore, did not properly raise his charge of constructive amendment on motion to the district court, but instead raises it for the first time on appeal.

Where a claim of constructive amendment is raised for the first time on appeal, review is for plain error. *United States v. Delgado,* 256 F.3d 264, 278 (5th Cir.2001). Accordingly, a defendant must show: "(1) an error; (2) that is clear or plain; (3) that affects the defendant's substantial rights; and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Longoria,* 298 F.3d 367, 371 (5th Cir.2002).

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[22] Rule 34 provides: "The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Fed.R.Crim.P. 34.

There is some indication that the Government shifted its focus at trial from the actual billing code numbers for Hubbard Tank treatment to the lack of individual supervision afforded patients while in the clinic's pool. This shift in emphasis, however, does not necessarily mean that there was a constructive amendment to the indictment. As discussed above, at least some evidence at trial indicated that billing for a Hubbard Tank included the implicit representation that patients were supervised. Proof of the absence of supervision, therefore, was relevant to the Government's claim that billing for a Hubbard Tank was a material misrepresentation. The Government's closing argument also indicates that the evidence regarding the lack of supervision was introduced not as part of a shift in the Government's theory, but in order to negate Lopez's claim of mistake. Given that there were two plausible bases, other than a constructive amendment, for introducing evidence regarding lack of supervision, we hold that the district court's denial of Lopez's motion for arrest of judgment did not amount to plain error.[23]

F. *Severance*

Lopez next argues that the district court erred when it denied his motion for a severance.[24] We review a denial of a

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[23] We also observe that Lopez does not raise on appeal any complaint that the jury charge authorized conviction on a basis not charged in the indictment and did not make any such objection to the charge below.

[24] Goldberg also seeks in his reply brief to adopt Lopez's challenge to the district court's denial of a severance. *See* note 14, *supra*.

motion to sever for an abuse of discretion. *United States v. Cortinas,* 142 F.3d 242, 247 (5th Cir.1998).

We also review Lopez's argument with an eye to two general principles, namely, that a court should order separate trials only where "[i]t appears that a defendant . . . is prejudiced by a joinder of offenses," Fed.R.Crim.P. 14, and second, that "persons jointly indicted in a conspiracy case should generally be tried together." *United States v. Scott,* 795 F.2d 1245, 1250 (5th Cir.1986). Lopez fails to make the requisite showing.

Lopez looks for the necessary prejudice in his case in the volume of the evidence presented against Dr. Bieganowski and the subsequent "spillover" effect of that evidence on the jury. Lopez's spillover argument is unconvincing. A spillover effect, by itself, is an insufficient predicate for a motion to sever. *See United States v. Williams,* 809 F.2d 1072, 1085 (5th Cir.1987) ("[A]dditional evidence adduced at joint trials does not constitute compelling prejudice by itself."). Nor does Lopez's reliance on *United States v. Cortinas* lend much support to his attempt to demonstrate prejudice. *Cortinas* involved a drug conspiracy in which the evidence against some of the co-conspirators included evidence of the activities of a violent criminal gang. 142 F.3d 242, 248 (5th Cir.1998). Prejudice was found in that case because the defendants were never associated with the gang, and because the evidence of the gang's activities was "highly inflammatory" and included evidence of a shooting. *Id.* Lopez's situation is different. The evidence against Dr. Bieganowski was not as inflammatory as evidence of a shooting, and Lopez was undeniably a longtime associate of Dr. Bieganowski's.

Finally, even if the volume and nature of the evidence against Dr. Bieganowski had the potential to cause Lopez some prejudice, Lopez fails to show "that he did not receive adequate protection . . . through the court's instructions to the jury." *United States v. Posada-Rios,* 158 F.3d 832, 863 (5th Cir.1998). The district court instructed the jury that

> "A separate crime is charged against one or more of the defendants in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charge[d] should not control your verdict as to any of [*sic*] other crime or any other defendant. You must give separate consideration to the evidence as to each defendant."

We have previously stated that because a jury is presumed to follow the court's instructions, instructions such as those given here are generally sufficient to cure the possibility of prejudice. *See Posada-Rios,* 158 F.3d at 863-64. We also note that Lopez was charged in five counts of the indictment and was acquitted on three, namely count one, in which he, Bieganowski and others were charged with conspiracy to commit mail fraud (Bieganowski was convicted on this count), and counts three and four (mail fraud counts in which he was charged with Bieganowski, who was also acquitted on those counts). He was convicted on counts two and five (mail fraud counts in which he was jointly charged with Bieganowski, who was also convicted on those counts). Where, as here, a jury returns a verdict of not guilty on some counts and as to some defendants, "the presumption that the jury followed the court's instructions is even stronger." *Id.* at 864.

We therefore find that Lopez has failed not only to show prejudice, but also to demonstrate that the district court's instructions were insufficient to protect him from possible prejudice. Consequently, we reject Lopez's claim that the district court committed reversible error when it denied his motion to sever.

G. *Deliberate Ignorance*

Dr. Bieganowski claims that the district court erred in including a deliberate ignorance instruction[25] in the jury charge.[26]

"We review jury instructions to determine 'whether the court's charge as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them.'"

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[25] The court's instruction read as follows:

> "With respect to counts six through nine and eleven through fourteen as to defendant Arthur C. Bieganowski only, and count twenty-two as to defendants Arthur C. Bieganowski and Richard J. Goldberg only, you may find that the defendants had knowledge of a fact if you find that they deliberately closed their eyes to what would otherwise have been obvious to them. While knowledge on the part of a defendant cannot be established merely by demonstrating that a defendant was negligent, careless, or foolish, knowledge can be inferred if a defendant deliberately blinded himself to the existence of a fact."

[26] Goldberg in his reply brief also attempts to conclusory [sic] adopt all of "the non-fact specific issues presented by the co-appellants [naming them] which are not inconsistent with the issues he presents in his brief." Those arguments, however, are fact-specific insofar as they relate to the deliberate ignorance instruction, and Goldberg may not adopt them on appeal. *See United States v. Solis*, 299 F.3d 420, 433 n. 3 (5th Cir.2002).

United States v. Faulkner, 17 F.3d 745, 766 (5th Cir.1994). "The charge must be both legally accurate and factually supportable." *United States v. Cartwright,* 6 F.3d 294, 300 (5th Cir.1993).

Dr. Bieganowski does not challenge the deliberate ignorance instruction as an incorrect statement of law. Rather, drawing on language from *Faulkner,* he contends that the evidence adduced at trial does not support the inclusion of the instruction. In pursuing this track, however, Dr. Bieganowski faces a high hurdle. In deciding whether there is sufficient evidence to support a jury instruction, we "examine the evidence and all reasonable inferences therefrom in the light most favorable to the government." *Cartwright,* 6 F.3d at 300-301; *see also Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

Although a deliberate ignorance instruction should rarely be given, *Faulkner,* 17 F.3d at 766, we have permitted its use "'to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge.'" *United States v. Threadgill,* 172 F.3d 357, 368 (5th Cir.1999) (quoting *United States v. Lara-Velasquez,* 919 F.2d 946, 951 (5th Cir.1990)). "It is only to be given when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate indifference." *Id.* The instruction is proper, therefore, where the evidence shows "(1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct." *Threadgill,* 172 F.3d at 368.

We find that this case satisfies this test. Dr. Bieganowski maintained in his testimony,[27] in his closing statement below,[28] and in his brief on appeal, that what the Government characterized as fraud, was no more than "extensive errors [ ] in his billing procedure."

The second prong of the test also finds support in the record. Bieganowski admits on appeal that he was aware of certain billing errors. His practice was the subject of a televised investigative report into billing fraud, and he was aware of enough problems to prompt him to hire an outside billing consultant. When that billing consultant did eventually report the presence of systematic billing errors, Bieganowski, rather than evincing a desire to learn the nature and extent of those problems, simply directed the consultant to fix them. Finally, Bieganowski's nurses testified that they were given a script to follow in filling out progress notes and fee tickets, and openly and regularly remained behind in the clinic after it closed to fill out billing materials.

A jury could certainly infer from this evidence that Bieganowski could have been aware of the presence of fraud, but instead deliberately closed his eyes to it. We reject Bieganowski's claim that the record does not support a deliberate ignorance instruction.

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[27] Dr. Bieganowski, for example, testified on cross-examination that when he was given progress notes, "they were somehow incomplete or were not done."

[28] Counsel for Bieganowski maintained during closing argument below that the Government's evidence only established a pattern of billing errors.

Bieganowski, however, also maintains that the district court's instruction, even if supported by the record, prejudiced him by unfairly singling him out from his co-defendants. We initially note that Bieganowski's contention in this respect has some arguable merit. We are aware of the risk inherent in a deliberate ignorance instruction, *see United States v. Soto-Silva,* 129 F.3d 340, 345 (5th Cir.1997), and we have noted that in a multiple-defendant case where only some of the defendants justify a deliberate ignorance charge, "singling out the defendant who merits the instruction, based, perhaps, on disputed or equivocal evidence, may be unfairly prejudicial to that defendant." *United States v. Reissig,* 186 F.3d 617, 619 (5th Cir.1999). It is equally true, however, that "giving the instruction generally, without naming a specific defendant," may prejudice those co-defendants who do not merit the instruction. *Id.* Thus, we have indicated that the better approach in this situation is to "give the instruction and indicate that [it] may not apply to all of the defendants." *Id.* at 619-20.

In *Reissig* this Court considered the appeal of five jointly tried defendants convicted of participating in a fraudulent telemarketing scheme. They each contended that the district court erred in giving a deliberate ignorance instruction because the evidence did not warrant it. We held that as to one defendant the evidence *did* warrant the instruction, but agreed that it did not as to any of the other defendants. *Id.* at 619. We nevertheless affirmed their convictions because the instruction was one which "indicate[d]" that it "may not apply to all of the

defendants." *Id.* at 619-20.[29] We stated that the district court's approach was that "followed by the First Circuit in *United States v. Brandon,* 17 F.3d 409, 453 (1st Cir.1994)" and expressed our agreement with the First Circuit. *Reissig,* 186 F.3d at 620. We do not read *Reissig* as purporting to state a general rule requiring district courts to always follow the approach which the district court did there, or as holding that it would be *error* to restrict the deliberate ignorance instruction to one or less than all of several defendants. What we *held* in *Reissig* was that it was not error to fail to restrict the instruction to the sole defendant as to whom the evidence supported it. *Id.* at 619-20. That, too, is precisely what the First Circuit held in *Brandon.* There the court plainly indicated that the matter was one generally within the discretion of the trial court, stating:

> "We do not exclude the possibility that, on particular facts, it might so mislead a jury to give a general instruction, rather than one tailored to a specific defendant or rather than no instruction at all, as to be an abuse of discretion, but we emphasize that *judgments of this kind are primarily entrusted in the trial judge* who inevitably has a superior feel for the dynamics of the trial and the

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[29] The trial court's instruction was as follows:

"You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise be obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact." *Id.* at 619 n. 1.

> likely reaction of the jury." *Brandon,* 17 F.3d at 453 (emphasis added).

We agree. The law in this Circuit is well established that "[a] district court has broad discretion in framing instructions to the jury, and this Court will not reverse unless the instructions taken as a whole do not correctly reflect the issues and the law." *United States v. Alarcon,* 261 F.3d 416, 424 (5th Cir.2001) (internal quotations omitted); *United States v. Davis,* 226 F.3d 346, 357-58 (5th Cir.2000); *United States v. Moser,* 123 F.3d 813, 825 (5th Cir.1997); *United States v. McKinney,* 53 F.3d 664, 676 (5th Cir.1995). Here the charge correctly reflected the issues and the law and we find no abuse of discretion in the district court's framing of the deliberate ignorance instruction under the circumstances presented.

We reject Bieganowski's complaints as to the deliberate ignorance instruction.

H. *Prosecutorial Misconduct*

Appellants Diaz and Bieganowski contend that the Government engaged in prosecutorial misconduct with respect to Linda Howard, an expert witness for the defense.[30] After

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[30] Bieganowski also claims that district court impermissibly threatened Linda Howard with sanctions should she refuse to testify. This claim is without merit. When counsel for Bieganowski notified the court that Howard was considering withdrawing as an expert witness, the court noted that if Howard did refuse to testify, she would have to return to the registry of the court any fee that she had already been paid for her testimony. Bieganowski cites no support for his assertion that Howard was in any way intimidated by the court's statements, and his attempts to cast those statement as a threat of sanctions is meritless.

the close of the Government's case in chief, both Diaz and Bieganowski moved for a mistrial on the grounds of prosecutorial misconduct, alleging that the prosecution had improperly attempted to intimidate a defense expert witness, Linda Howard. The challenged comments included a warning issued by the prosecutor, the Assistant United States Attorney, to counsel for Bieganowski, to the effect that the Government was considering charging Howard with misprision of a felony and perjury.

The Sixth Amendment guarantees a criminal defendant the right to present witnesses to "establish his defense without fear of retaliation against the witness by the government." *United States v. Dupre,* 117 F.3d 810, 823 (5th Cir.1997); *see also Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). In addition, the Fifth Amendment protects the defendant from improper governmental interference with his defense. Thus, "substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant." *Id.* (quoting *United States v. Whittington,* 783 F.2d 1210, 1219 (5th Cir.1986)). Whether a defendant has made a showing of substantial interference is a fact question, and we therefore review a claim of prosecutorial intimidation for clear error. *United States v. Thompson,* 130 F.3d 676, 686-87 (5th Cir.1997).

The Government does not dispute that it considered prosecuting defense expert Howard for misprision of a felony. The record is equally clear, however, that by the time Howard was to testify, the Government had further reviewed the evidence in the case and had assured Howard that she would not be so charged, an assurance that the district court conveyed to Howard. The Government also concedes that it told counsel for Bieganowski that it

would consider prosecuting Howard for perjury if she were, in fact, to perjure herself. Diaz and Bieganowski both attempt to demonstrate that these comments amounted to a substantial interference with Howard's choice to testify.

When judged against our prior cases, it becomes clear that the prosecution's comments did not rise to the level of substantial interference. In *United States v. Viera,* 839 F.2d 1113 (5th Cir.1988) (en banc), the prosecution publicly stated that if a defense witness testified and provided incriminating evidence against himself, then that witness would be indicted. *Id.* at 1115. This Court, however, declined to find that there had been substantial interference even where the witness subsequently failed to testify.[31] By contrast, Howard, after receiving assurances from the district court and from the Assistant United States Attorney, did testify.[32] If the comments in *Viera* did not amount to a substantial interference, then the comparatively benign comments in this case certainly did not.

It is equally clear that the prosecution's comments regarding perjury did not amount to a substantial interference. The prosecution did no more than to advise Howard that she could be prosecuted if she perjured herself in her testimony by stating she had previously worked for the

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[31] The *Viera* court emphasized that there was no evidentiary showing establishing that the prospective witness failed to testify because of the alleged threats. *Viera,* 839 F.2d at 1115.

[32] Howard testified extensively on behalf of the defense. And although they allege that Howard's preparation for her testimony was hindered by the threats, Diaz and Bieganowski fail to cite any evidence tending to show that her actual testimony was in any way impaired.

FBI, a matter which was, at most, collateral to the subject matter of her intended testimony. There is no substantial interference in such a statement. On the contrary "[a] prosecutor is always entitled to attempt to avert perjury and to punish criminal conduct." *Viera,* 839 F.2d at 1115; *United States v. Thompson,* 130 F.3d 676, 687 (5th Cir.1997) ("[T]he government told the witnesses that they had to testify truthfully. . . . That procedure, however, even if carried out in a caustic manner, is no cause to dismiss the indictment against the defendants." (quoting *United States v. Hayward,* 6 F.3d 1241, 1257 (7th Cir.1993))). Accordingly, we find that the prosecution's comments did not amount to substantial interference and we reject the claim of Diaz and Bieganowski that their Fifth or Sixth Amendment rights were, in any way, violated.

I. *Evidence of the Prosecution's Threats*

In addition to arguing that the prosecution's threats violated his Fifth and Sixth Amendment rights, Bieganowski also maintains that the district court erred when it prohibited him from introducing evidence of those threats to the jury, relying on *United States v. Lowery,* 135 F.3d 957 (5th Cir.1998). We disagree.

Lowery is wholly inapposite. There the defendant, Lowery, was charged with obstruction of justice by attempting to influence Taylor to testify falsely in a then pending criminal tax case against Lowery's girlfriend, Sanders. Lowery's defense was that he understood that in the Sanders case the IRS had begun "to pressure witnesses to testify in a manner consistent with the IRS position," that Taylor had previously made statements "consistent with . . . [Sanders'] innocence, and he feared the IRS was intimidating

Taylor to state otherwise." *Id.* at 958. We held that the exclusion of evidence of the IRS witness intimidation in the Sanders case "was error, because any evidence that the IRS was intimidating witnesses in the Sanders case would be relevant to Lowery's case, given that his theory of defense was that he was trying to encourage witnesses to tell the truth in the face of IRS pressure to do otherwise." *Id.* at 959. In *Lowery* the government witness intimidation sought to be shown occurred before and was a cause of the defendant's charged conduct and was relevant to show his state of mind in engaging in that conduct. Here, by contrast, the alleged witness intimidation occurred more than a year after the conduct charged in the indictment and had no relevance to it or to the state of mind of Diaz or Bieganowski in engaging in such conduct. In *Lowery* we applied an "abuse of discretion" review to the trial court's exclusion of the evidence. *Id.* at 959. Applying that same standard here, it is clear that the trial court did not abuse its discretion in excluding the evidence.

J. *Instructions in response to jury note*

In his final point of error, Bieganowski argues that the district court reversibly erred when it issued a supplemental jury instruction without first notifying counsel for the defense.

On May 5, 2000, after the case had gone to the jury, the jury delivered a note to the court, the relevant portion of which read: "Also on counts 2, 3, 4, & 5 we've not been able to locate HCFA's for counts 3 & 4. Do we or can we rely on [w]itness [t]estimony?" Upon receiving this note, and without first advising counsel for the defense of it, the district court responded to it by instructing the jury:

> "In response to jury note 1, you are advised that, in my preliminary instruction to you at the beginning of the trial, I instructed you on the following as to evidence: 'The evidence from which you will find the facts will consist of the testimony of witnesses, documents, and other things received into the record as exhibits. . . .'
>
> Thus, in answer to your question, I once again remind you that witness testimony is evidence."

Federal Rule of Criminal Procedure 43 guarantees a defendant the right to be present at every stage of the trial. That right requires that "[w]hen a communication is received from the jury, counsel should be informed of its substance and afforded an opportunity to be heard before a supplemental charge is given." *United States v. McDuffie,* 542 F.2d 236, 241 (5th Cir.1976). The Government in this case concedes that this right was violated. The only remaining question, therefore, is whether the violation was harmless or constitutes reversible error. *See United States v. Sylvester,* 143 F.3d 923, 928 (5th Cir.1998).

Here, the district court did not issue a true supplemental instruction. Rather, it simply resubmitted to the jury a portion of the original jury charge, an instruction to which Bieganowski had not previously objected. Bieganowski presents the same argument that was rejected in *Sylvester,* namely that prejudice resulted when the district court reread only a portion of the original instructions to the jury. *Sylvester,* 143 F.3d at 929. Beginning with the proposition that the failure to notify defense counsel of a jury communication is harmless when an "answer to the jury's inquiry [is] distinctly responsive, . . . clearly state[s] the law, and no prejudice is shown," *Sylvester,* 143 F.3d at 928, this Court concluded that rereading a portion of the

original instructions in response to a jury question was harmless error. *Id.* at 929; *see also United States v. Breedlove,* 576 F.2d 57, 60 (5th Cir.1978) (finding the court's error in answering a jury note without first notifying the defense to be harmless).

Bieganowski, however, attempts to distinguish *Sylvester* by arguing that the district court in that case did not simply issue a supplemental instruction, but also tempered that instruction by reminding the jury to keep the court's original instructions in mind, and to apply all the instructions during its deliberations. *Sylvester,* 143 F.3d at 929. Although the district court's supplemental instruction here did not clearly admonish the jury to rely on the original instructions, the supplemental instruction nevertheless referenced the original instructions. It was therefore evident from the language of the supplemental instruction that the original instructions remained in full force.

Diaz and Bieganowski also fault the court's response to the jury note on the basis that it suggests to the jury that they need not be concerned with being unable to find the HCFA forms on which counts three and four were based or at least improperly minimized the importance of the HCFA forms in respect to counts three and four. However, it is clear that there was no prejudice, for none of the appellants were convicted of either of those counts.[33]

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[33] Bieganowski and Lopez were acquitted of counts three and four; neither Diaz nor Goldberg was charged in either of those counts.

K. *Sentencing*

In his final point of error, Lopez challenges the evidentiary basis for the district court's application of the Sentencing Guidelines. Specifically, Lopez disputes the district court's finding that he was accountable for $961,287.50 in losses under section 1B1.3(a)(1)(B) of the Sentencing Guidelines.[34]

We review a district court's interpretation and application of the Sentencing Guidelines *de novo,* and its factual findings for clear error. *United States v. Ismoila,* 100 F.3d 380, 394 (5th Cir.1996). Having reviewed the basis for the district court's finding, we conclude that Lopez's claim has no merit.

Findings of fact for sentencing purposes need only be established by a preponderance of the evidence. *United States v. Hull,* 160 F.3d 265, 269 (5th Cir.1998). In this case, the Presentence Report attributed $43,084,042.27 in losses, a figure representing the entire amount billed to insurance companies during the course of the conspiracy, to Lopez. The district court, however, elected to hold Lopez

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[34] Section 1B1.3(a)(1) provides that a defendant is responsible at sentencing for

> "(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."

U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A), (B).

responsible only for those bills that reflected charges for Hubbard Tank treatment, and accordingly departed from the Presentence Report to reduce the dollar value of Lopez's conduct from $43,084,042.27 to $961,287.50.

The guilty verdicts returned against Lopez, together with the Presentence Report constitute a sufficient evidentiary basis for this finding. *See, e.g., United States v. Lghodaro,* 967 F.2d 1028, 1030 (5th Cir.1992) ("The PSR is considered reliable and may be considered as evidence by the trial judge in making factual sentencing determinations."). We decline to hold, therefore, that the district court was clearly erroneous in holding Lopez responsible for the entire $961,287.50.

Conclusion

For the foregoing reasons, the convictions and sentences of each appellant are in all things

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES
OF AMERICA

v.

ARTHUR C.
BIEGANOWSKI, M.D.
Defendant.

Case Number
EP-98-CR-959-DB(1)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After
November 1, 1987)

(Filed Aug. 28, 2000)

The defendant, ARTHUR C. BIEGANOWSKI, M.D., was represented by Charles Roberts and H. Davidson Smith.

The defendant has been found not guilty on counts 3, 4, 6, 12 and 14 and is discharged as to such counts.

The defendant was found guilty on counts 1, 2, 5, 7, 8, 9, 10, 11, 13, 22 by a jury verdict on May 12, 2000 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18 U.S.C. 1341 and 371	Conspiring to commit mail fraud	8-4-98	1
18 U.S.C. 1341 and 2	Aiding and abetting to commit mail fraud	1-31-94, 9-7-94 12-31-95	2, 5, 10,

18 U.S.C. 1341	Mail fraud	10-30-94, 9-30-95 7-31-95, 9-11-95 8-4-98	7, 8, 9, 11, 13,
18 U.S.C. 1956	Conspiring to launder monetary instruments	8-4-98	22

As pronounced on August 25, 2000, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 1,000.00, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 28th day of August, 2000.

/s/ David Briones
DAVID BRIONES
United States District Judge

Defendant's SSAN: 126-34-6174
Defendant's Date of Birth: 10-4-43
Defendant's address: 208 Whispering Sands,
Santa Teresa, Mexico 88008

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty months (60) months as to count 1; sixty (60) months as to count 2; sixty (60) months as to count 5; sixty (60) months as to count 7, sixty (60) months as to count 8; sixty (60) months as to count 9, sixty (60) months as to count 10, sixty (60) months as to count 11; sixty (60) months as to count 13, and one hundred and sixty-eight (168) months as to count 22; sentence of imprisonment imposed in counts 2, 5, 7, 8, 9, 10, 11, 13 and 22 to be served concurrently with that imposed in count-1.

The court makes the following recommendations to the Bureau of Prisons: that the defendant be committed at F.C.I., La Tuna, Texas.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By /s/ _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years as to count 1; two (2) years as to count 2; two (2) as to count 5; two (2) years as to count 7, two (2) years as to count 8, two (2) years as to count 9, two (2) years as to count 10, two (2) years as to count 11, two (2) years as to count 13 and two (2) years as to count 22; terms of supervised release imposed in counts 2, 5, 7, 8, 9, 10, 11, 13 and 22 to be served concurrently with that imposed in count 1.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

X The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment plan.

X The defendant shall provide the probation office access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that

remains unpaid at the commencement of the term of supervision in accordance with a schedule to be approved by the Court. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not posses a firearm as defined in 18 U.S.C. §921.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer. The above drug testing condition may be suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

7) The defendant shall not leave the judicial district without the permission of the Court of Probation Officer.

8) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

9) The defendant shall answer truthfully all inquires by the Probation Officer and follow the instructions of the Probation Officer.

10) The defendant shall support his or her dependents and meet other family responsibilities.

11) The defendant shall work regulary [sic] at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

12) The defendant shall notify the Probation Officer ten days prior to any change in residence or employment.

13) The defendant shall refrain from excessive use of alcohol.

14) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

15) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

16) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

17) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

18) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

19) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
(see attached list of victims)	$23,049,853,38 [sic]

Payments of restitution are to be made to Clerk, United States District Court for transfer to the payees.

The restitution shall be paid jointly and severally with the co-defendant Richard J. Goldberg. Restitution shall be paid immediately.

To minimize administrative burdens and costs and to provide meaningful restitution disbursements to the victims, the restitution monies collected will be disbursed to the victims on a pro rata basis whenever the current balance in the restitution account equals or exceeds $500,000.00. In the even [sic] no disbursement has been made after one (1) year from the date of sentence, then the restitution monies collected at that time will be disbursed to the victims on a pro rata basis. Thereafter, disbursements will occur annually, provided all victims receive a minimum of ten dollars ($10.00) in that disbursement.

The Court is aware that addresses are not available for all victims in this case. Accordingly, The United States District Clerk shall only make disbursements to victims whith [sic] known addresses as provided by the United States Probation Office. In the event a victim's address is established after initial payments are made, then that victim's entitlement to payment shall start, prospectively, at that time.

If the defendant is now unable to pay is [sic] indebtedness, he shall cooperate fully with the office of the United States Attorney, the Bureau of Prisons and/or United States Probation Office to make payment in full as soon as possible, including during any period of confinment. Any unpaid balance at the commencement of a term of supervised release may be paid on a schedule of monthly installments to be approved by the Court and becomes a condition of supervision.

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

1) Net proceeds derived from the interlocutory sales of the Real Property located at 208 Whispering Sands, Santa Teresa, New Mexico.

2) Eleven million dollars ($11,000,000.00) in United States currency.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	35
Criminal History Category:	1
Imprisonment Range:	60 months as to counts 1, 2, 5, 7-10, 11, 13 168 months to 210 months as to count 22
Supervised Release Range:	2 to 3 years
Fine Range:	$ 20,000.00 to $ 200,000.00
Restitution:	$

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does exceed 24 months.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50593

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

GUSTAVO DIAZ; ARTHUR C. BIEGANOWSKI, M.D.; RICHARD J GOLDBERG, C.P.A.; JESSE JAIME LOPEZ
Defendants-Appellants

Appeals from the United States District Court
for the Western District of Texas, El Paso

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

(Opinion 11/22/02, 5 Cir., ___, ___ F. 3d ___)

(Filed Dec. 30, 2002)

Before GARWOOD and CLEMENT, Circuit Judges and RESTANI,*

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* Judge of the United States Court of International Trade, sitting by designation.

PER CURIAM:

(✓) The Petitions for Rehearing filed by Arthur C. Bieganowski and Richard Goldberg are DENIED; and, no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc filed by Jesse Jaime Lopez is also DENIED; treating Lopez's Petition for Rehearing En Banc as a Petition for Rehearing, the Petition for Rehearing is DENIED. [/s/ wg]

( ) The Petitions for Rehearing filed by Arthur C. Bieganowski and Richard Goldberg are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc filed by Jesse Jaime Lopez is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Garwood
United States Circuit Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	EP-98-CR-959-DB
vs.	)	
ARTHUR C. BIEGANOWSKI (1) RICHARD J. GOLDBERG (3) GUSTAVO DIAZ (6) JESSE JAIME LOPEZ (7) GUADALUPE RODRIGUEZ MORALES (9)	)	El Paso, Texas
	)	April 12, 2000

VOLUME 27 OF 43 VOLUMES
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[27-154] MR. ORTEGA: Thank you, Your Honor.

THE COURT: What else do we have?

MR. ROBERTS: Your Honor –

MR. ORTEGA: Will you take judicial notice of that fact, Your Honor?

THE COURT: What?

MR. ORTEGA: Of that – of the statute, Title 22 of the examining board?

THE COURT: If you wish me to, I will.

MR. ORTEGA: Okay. I do, Your Honor.

THE COURT: Very well.

MR. ROBERTS: Your Honor, something has occurred that I think needs to be addressed right now. Apparently – Mr. Smith has informed me that yesterday, that the United States mentioned the possibility of a misprision prosecution against Linda Howard, our expert, and that she either needed or probably needed an attorney to accompany her when she testifies as our witness.

We comm- – we sat down – I sat down with Linda Howard over lunch, and she is not, at this time – she wants to talk to her husband and her kids and everything.

THE COURT: Who mentioned –

MR. ROBERTS: She is our expert witness, [27-155] Your Honor.

THE COURT: Who mentioned the possibility of a misprision?

MR. ROBERTS: I believe we'll have to put Mr. Smith on the stand.

MS. KANOF: It was me.

MR. ROBERTS: Okay.

THE COURT: Are you really considering that?

MS. KANOF: Your Honor, this Saturday, Special Agent Griego provided me with four 302 statements for four different witnesses who will testify in rebuttal that Linda Howard, after the Government searched Dr. Bieganowski's office, told them that it was

just a matter of time, from what she saw in his office, that he, you know, had broken the law.

And all I told Mr. Smith was that if she testifies, that – basically, that everything – that she didn't see anything that was illegal, then she might be committing – she might have put herself in a position of a misprison.

Since that time – they gave me discovery yesterday. And in the discovery, I realized that she was communicating to Dr. Bieganowski through her attorney – through his attorney, and then she did not have the obligation to report it, because she was [27-156] communicating the information about the illegality to Mr. Darnell, which, because she was hired from Mr. Darnell, she had a privilege.

So then, she did – because she learned about the crime as an agent of an attorney, then she did not have the problem of a misprision.

And so, I guess the Government's position is now, that while she can be impeached by those statements if she says anything contrary – and I will represent to the Court she also told those people that she had worked for the FBI, she had done audits for the FBI, which she never did. That – you know, she is facing impeachment through that.

But now, in trying to think through whether or not it would be a misprision, when you get – I think – I guess when – I've never been a defense attorney, but when you learn about a crime working for a defense attorney and you don't communicate it to the Government, I guess you don't have an obligation. So a misprision probably would not be an issue in this case. but I didn't – I didn't realize that until I went through their discovery last night.

MR. ROBERTS: Your Honor, the Government has known for years that Linda Howard was hired by Jim Darnell. It's actually in Lucy Campos' 302. Our witness is [27-157] shaken. I need to give an opening statement. She's a major part of our case. She cannot tell me right now whether she will or will not testify for us.

She wants to talk to her husband. She wants to consult with her family, and she wants to see a lawyer, as Ms. Kanof told her.

Now, perhaps the Government should have done research before communicating the possibility of misprision charge to Mr. Smith. I don't know.

THE COURT: What do you want me to do, Mr. Roberts? What do you want me to do about it?

MS. KANOF: Excuse me, Your Honor. Can I just respond?

I told him before we started yesterday, so evidently they waited until today to tell her. That was number one.

I waited until I saw if she was a witness on their list, which yesterday is when I found out that she was definitely going to be a witness, because I had no way of knowing, didn't think she would open herself up.

And, Your Honor, thirdly, your discovery order requires him to have given discovery at some time in advance. And if they were going to use her all along, and I had received the discovery before yesterday, then I might have had a better amount of information [27-158] in order to communicate it to them.

THE COURT: What do you want me to do, Mr. Roberts? If there was some way I could rule that she is not going to be indicted, I would do that, but I can't do that.

MR. ROBERTS: I know that.

Well, Your Honor, first, I'm requesting a mistrial.

THE COURT: Overruled.

MR. ROBERTS: Secondly –

MR. ORTEGA: Join in that motion, please.

MS. STILLINGER: Your Honor, I join in that request also. I don't understand why their decision whether or not to charge her is tied to her testifying.

MS. KANOF: No, I'm not saying I'm going to charge her. I'm saying that she has exposure if she testifies. And I'm now telling the Court that once I understood that the communication – first of all, once I understood she was a witness, which was not until yesterday morning. And the minute I found out she was a witness, I went and sought out Mr. Roberts. He wasn't available, so I told his co-counsel. And it was before we started yesterday. And – that's number one.

[27-159] And number two, when I saw the discovery, I realized the communications she was making about – that she actually did communicate that things were wrong in Dr. Bieganowski's office, she communicated them to Mr. Darnell. Now, that is privileged information that I never had before this time, and that's how I know that it was – now, I don't have the misprision problem.

I'm not going to indict her for misprision. You can go inform her of that. Had I had the discovery at the time, I

could have made that decision. All I was telling her is – actually, what I was doing is to make sure they didn't set her up, that – without knowing what had happened with these other four witnesses.

THE COURT: Well –

MR. ROBERTS: Your Honor, we designated her as an expert, a week before trial began, as our expert witness. If Ms. Kanof cannot figure out that she's – there's a possibility she would be a witness by that, I don't know what to say.

Secondly, I've had a million questions developed on examination of everybody. The problem is, we have a witness who I'm making a representation – And I guess it's – Ms. Kanof has admitted that she did [27-160] mention misprison, and then perhaps that that – that Ms. –

THE COURT: Ms. Kanof, do I have a commitment from you that there's not going to be any action taken from the –

MS. KANOF: Yes, you do, Your Honor.

THE COURT: You can inform her so. If you want to, and I'll inform her.

MR. ROBERTS: I would like you to inform her, Your Honor. But I would still think – the second remedy I would ask is if I could give opening – until after she's made her decision. Because if she decides to not –

THE COURT: Okay. Have you-all decided who's going to be first?

MR. ROBERTS: We are, Your Honor. We have to, because –

THE COURT: I'm not going to – I'm not going to continue this until tomorrow. We're going to go on.

MR. ROBERTS: Well, no, I don't mean to continue it, Your Honor. If I could just delay my opening until she makes a decision, because it will completely change my opening.

THE COURT: When do you want to bring her in here, and I'll tell her that I have a commitment from the [27-161] Government, and I won't press for any –

MR. ROBERTS: We can do that, Your Honor, but I'm just asking, until she makes a firm decision to be my witness, I can – I hardly can't make an opening, and I'm not exactly responsible for this situation.

THE COURT: I'll give you an opportunity to make an opening.

Who will be your first witness?

MR. ROBERTS: Just a second, Your Honor. We would like to bring Ms. Howard in, because that might –

THE COURT: Mr. Ortega needs to make an opening.

MR. ROBERTS: Yes.

MR. GARCIA: Your Honor, in the meantime, we now figured out what it is that was not admitted yesterday, I think.

Your Honor, we again move for admission –

MR. RAMOS: Excuse me.

Your Honor, before we leave this matter, I just wanted to inform the Court, for the record, that I join Mr. Roberts in his Motion for Mistrial, and I believe, now, the Defense has been put in a position of where a major witness, whose testimony would affect the defense of all the Defendants on trial, not just Dr. Bieganowski –

THE COURT: Well, have you designated her as a [27-162] witness for you, too?

MR. RAMOS: Pardon me?

THE COURT: Have you designated her as a witness for you, too?

MR. RAMOS: No, I have not, Your Honor. What I'm saying is that her testimony, although she's going to be called by Mr. Roberts, will affect the defenses of all the Defendants, because I believe her testimony has to do with the coding and the billing that was going on in the doctor's offices.

And this witness, clearly, has now been intimidated. Whether the Government now retracts their threat or not, she's clearly intimidated. And it has put a chilling effect on the constitutional right of the Defendants to present their defense.

MS. STILLINGER: And I would like to join in those comments, also.

MR. ORTEGA: We would join as well, Your Honor.

MR. ROBERTS: And besides the instruction, Your Honor, I would like for the Court – the Court can

query her as to whether she felt, you know, intimidated by these things.

THE COURT: Ms. Howard, come up here, please, if you would.

I know that there's been some discussion with [27-163] Mr. Smith, who had informed you that the Government said something about a misprision. I wanted to let you know that the Government has made a commitment here that they will do no such thing.

THE WITNESS: Okay.

THE COURT: I think when the discussion came up, they were not clear as to why – how you had done it. Since you were working for an attorney at the time, that was privileged, so they cannot use it against you.

THE WITNESS: Okay.

THE COURT: I now have – I have a commitment from the Government that they're not going to do any such thing.

THE WITNESS: Okay.

THE COURT: No, are you willing to testify in this case?

THE WITNESS: Yes, sir. I feel that I was very much intimidated by the Government. Also, there has been another agent that I recognize in court that has come into my office before I tes- – before I started in this case, and I don't believe he revealed his correct name. I haven't been able to find out. So I think I've been intimidated more than this time.

THE COURT: I understand. I understand. But I [27-164] just want to let you know that there is a commitment that there's not going to be any charges. Okay?

THE WITNESS: Okay. I understand.

THE COURT: Anything else, Counsel? Mr. Roberts?

MR. ROBERTS: No, except that we just reurge our Motion for Mistrial.

THE COURT: Overruled.

You may be excused, ma'am.

MR. ROBERTS: Your Honor, can I spend just two minutes discussing with Linda Howard –

THE COURT: You may.

MR. ROBERTS: – what's occurred here? And hopefully, she can give us an answer.

MR. ORTEGA: Your Honor, while they are doing that, can I leave the courtroom for a second? I'll return.

THE COURT: We'll take a five-minute break so you can settle your things.

We'll be in recess for the next five minutes.

(Recess taken; open court; jury not present.)

THE COURT: Mr. Roberts, Mr. Smith?

MR. SMITH: Your Honor, Mr. Roberts has asked me, since I was the recipient of the statement, to really tell the Court that Ms. Kanof asked me who our

expert would be, and I told her it would be Linda Howard, and [27-165] it's given her the 24-hour notice. And she told me that if Ms. Howard were to testify, that she would –

THE COURT: I thought we already resolved this.

MR. SMITH: We have, Your Honor, except there are a couple of other little nuances, I think.

If Ms. Howard were to testify, that she would need to have an attorney present, because there was a possibility of a charge of misprision, and also charges of perjury.

Additionally, Your Honor, I think the Court should know that several weeks before this trial began, Ms. Howard called me and told me that there were agents at her place of work, and they were trying to talk to her, and she had informed them that she was – in fact, had been hired by Jim Darnell, and the she was under the belief that the attorney/client privilege applied. And she had been informed that it no longer applied. Thus, she was certainly far more fearful now of the misprision, because she had been informed the attorney/client no longer applied, although we, of course, told her that it had.

Additionally, Your Honor, we would like the Court to take notice of Lucy Campos' 302s, in which she states that Linda Howard was, in fact, hired by Jim Darnell to assist the doctor in doing –

[27-166] THE COURT: What does that have to do with what we have?

MR. SMITH: I was just going to get that on the record.

THE COURT: Very well.

MR. SMITH: That's all we have. Okay?

And again, we would renew our Motion for a Mistrial, Your Honor.

THE COURT: Overruled.

MR. SMITH: Thank you.

THE COURT: Mr. Ortega, do you want to make your opening tomorrow, or when?

MR. ORTEGA: That's fine, Your Honor.

THE COURT: If Mr. Roberts –

MR. ORTEGA: That's fine.

THE COURT: – starts opening?

MR. ORTEGA: Okay.

THE COURT: So I can inform the jury that, to get started, we're going to call witnesses, but then I'll give you a chance to make an opening statement tomorrow morning.

MR. ROBERTS: That's fine. Ms. Howard wants to, of course, talk to an attorney, and nobody can deny her that right. And it's going to have to be done this afternoon, you know, tomorrow morning –

[27-167] THE COURT: Very well.

MR. ROBERTS: – or pretty much when she can get ahold of one.

THE COURT: Very well.

Mr. Garcia, you had –

MR. GARCIA: Yes, Your Honor.

THE COURT: Have these been admitted, or they haven't?

MR. GARCIA: Well, Your Honor, my understanding is that these have not been admitted from yesterday. I had urged them, and my understanding at the time was that – I think Ms. Stillinger had some problems with the rehabilitation checks, and – and we had moved for 730B, 731B1, 731B2, 731C1 through C4, 733B1 through B2, 733C1 through C4, 732B1 through B4, 737B1 through B14, 737C1 through C24, 727D1 through D11, 736B1 through B14, 736D1 through D14, 739B1 through B11, 739C1 through C8.

THE COURT: I have all these as being admitted already.

MR. GARCIA: Oh, you do, Your Honor?

THE COURT: Virginia, do you?

MS. STILLINGER: I think that those were all admitted.

THE COURT: Okay. Hold on.

* * *

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	EP-98-CR-959-DB
vs.	)	
ARTHUR C. BIEGANOWSKI (1)	)	El Paso, Texas
RICHARD J. GOLDBERG (3)	)	
GUSTAVO DIAZ (6)	)	
JESSE JAIME LOPEZ (7)	)	April 17, 2000

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UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[29-103] wherever.

THE COURT: When were you going to put Linda Howard on?

MR. ROBERTS: Probably at 2:00, or very soon after lunch.

THE COURT: How about tomorrow?

MS. KANOF: Your Honor, tomorrow would be fine. We'll inform Ms. McGlothin.

But we also have another issue we wanted to bring up to the Court with regard to Ms. Howard, and it's a Motion in Limine. We have it written, but if the Judge wants to

hear argument now, since the jury is not here, that would be okay, also.

Do you want to hear the Government's Motion?

THE COURT: Might as well.

MS. KANOF: The Government would – has a written Motion in Limine, but would also make an oral Motion in Limine with regard to these alleged threats.

Mr. Roberts, in his opening to the jury, said they were going to prove that the Government had threatened witnesses. And if that's what he's referring to, I'd ask the Judge to issue a Motion in Limine. And that's what we have, a full writing and explanation of my ethical duty, and the circumstances under which I communicated it.

[29-104] I never talked to her. It would be hearsay. I was – I did not say it in a threatening manner. I fleshed out the issues with Mr. Smith. Mr. Smith agreed that that might be a problem.

And also, with regard to the potential of perjury on her part, I've talked to Gary Weiser, who used her for Mr.-– Dr. Gifford before, and Gary Weiser said she also told him that she had worked for the FBI. So –

THE COURT: What's the Motion in Limine?

MS. KANOF: The Motion in Limine is –

THE COURT: The so-called threats?

MS. KANOF: Yes, that I threatened her to try to protect her – to prevent her from testifying.

THE COURT: Mr. Roberts?

MR. ROBERTS: Your Honor, I'm willing to approach the bench before getting into that.

THE COURT: Well, you can't approach the bench, because I'm going to order it.

MR. ROBERTS: But I –

THE COURT: It's not going to come in.

MR. ROBERTS: I think a threat to a witness is as relevant as anything else.

THE COURT: Well, it's not – if you can call it a threat. I don't necessarily consider it a threat.

[29-105] Anything else before we bring in the jury?

Mr. Ramos?

MR. RAMOS: Your Honor, may I add something concerning the issue of prosecution threat against a witness? I just want to make sure that the Court – that I get it – this into the record.

It seems to me, the way I understood this threat of prosecution has taken place, is that whether it was a threat of prosecution for perjury or whether it was for misprison [sic], we know for a fact that the threat to prosecute for a misprision of a felony was communicated, and that the threat of prosecution was keyed upon whether the witness testified, which, I think, is very, very important, and should not be left out of the record.

In other words, the situation is that it was communicated to Ms. Howard through Mr. Smith that if she testified she should have an attorney present, because the

Government would possibly prosecute her for misprision. Whether perjury was added or not, I don't know.

But the important thing is that the misprision was, and it was keyed on whether or not she testified. And I think that is what's important here.

THE COURT: Very well. You got it on the record.

[29-106] MR. SMITH: Yes, Your Honor. If I might, also. I was told to inform Ms. Howard that she would – if she were going to testify, she would need an attorney, because she may have committed a misprision and she may be perjuring herself, and she had to have her own attorney present.

Now, it's my duty, I believe, to notify her, and not to abuse her as a witness, and just to put her up and put her in harm's way.

THE COURT: Counsel, we've been through this before. Anything else you want to bring up?

MR. SMITH: That's it, Your Honor.

THE COURT: Okay. Bring in the jury.

(Open court; jury present.)

THE COURT: You may continue, Mr. Smith.

MR. SMITH: Thank you, Your Honor.

Q. (BY MR. SMITH) Okay. Mr. Bramblett, I believe we were at your operation in, what 1988?

A. Yes, Sir.

Q. And then a subsequent injury six months later?

A. December the 19th of 1988 is when I hurt my back taking inventory at the warehouse.

Q. Okay. And how did that happen, sir?

A. I was lifting a bunch of heavy boxes, and I went to lift one, and my back just snapped.

* * *

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	EP-98-CR-959-DB
vs.	)	El Paso, Texas
ARTHUR C. BIEGANOWSKI (1)	)	
RICHARD J. GOLDBERG (3)	)	
GUSTAVO DIAZ (6)	)	
JESSE JAIME LOPEZ (7)	)	April 18, 2000

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UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[30-9] (Open court; jury not present.)

THE COURT: Mr. Roberts, you had something to bring up?

MR. ROBERTS: Yes, Your Honor.

Your Honor, we have submitted a brief to the Court, and we've prepared it overnight, and it was printed up this morning, and it was submitted. It's dealing with the Motion for Mistrial that we've already made, and it's been overruled, but we are reurging it here. And I am being joined with other Defense Counsel.

Several things have happened since then. One, I relayed what Ms. Kanof said yesterday to my witness,

Linda Howard, and she again said that she may not testify.

THE COURT: Well, I'll tell you what. How much have you paid her? Do you have a contract with her, Mr. Roberts?

MR. ROBERTS: I –

THE COURT: If you paid her any money, she has to return it to you, and you're not supposed to pay her any money until you get a final okay from me, if she's not going to testify.

MR. ROBERTS: Your Honor, I paid her – I've paid her something like 16,000.

[30-10] THE COURT: All right. If she is not going to testify, she's breaching a contract, and she's got to return it.

MR. ROBERTS: Okay. Now –

THE COURT: To the registry of the Court, Mr. Roberts.

MR. ROBERTS: Your Honor, I want to state this. I talked to Gary Weiser last night, and – and he says two things to me. One, Linda Howard never told him that he worked – that she worked for the FBI. And, two, he has never discussed this subject with Debra Kanof. So we have an actual misrepresentation made to this Court yesterday morning. It was that misrepresentation that caused Linda Howard, or whatever, because she really respects Gary Weiser, and has worked with him on the *Gifford* case.

I want to say that, in this brief, it says that this kind of behavior is reversible error, per se. It does not require a

harm analysis. Overwhelming evidence does not save it. And even with stipulated testimony, it is still reversible, backed up by a United States Supreme Court case.

Now, what we've had here is a misrepresentation to the Court about what has been said. I go to my client, because I have to tall her what's been said [30-11] and what kind of stuff is going to be going on. And what we have is then – not my client, but my witness. I feel like she's almost my client – I get calls from her and her attorney late night, after I was in bed tonight (sic), and we are just simply stressed.

We are not going to – I do not know what to do. I do not how [sic] to control this situation. I have no idea, except to ask and reurge this Court for a mistrial in this case.

THE COURT: Overruled.

MS. KANOF: Your Honor –

MR. ROBERTS: Well, Your Honor, can we at least – one thing. Can we have, at least, the United States Attorney instructed, at least, to be truthful to the Court or something like this, because it's going to be conveyed.

THE COURT: I don't have to instruct him as to that, nor do I have to instruct you, Mr. Roberts.

MR. ROBERTS: Your Honor –

THE COURT: All of you are officers of the Court.

MR. ROBERTS: Your Honor, you brought me up here allegedly for handing candy to my client.

THE COURT: The marshal did. The marshals did.

MR. ROBERTS: No, you asked me to stand up here and reprimanded me yesterday for it.

* * *

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	EP-98-CR-959-DB
vs.	)	El Paso, Texas
ARTHUR C. BIEGANOWSKI (1)	)	
RICHARD J. GOLDBERG (3)	)	
GUSTAVO DIAZ (6)	)	
JESSE JAIME LOPEZ (7)	)	April 18, 2000

VOLUME 30 OF 43 VOLUMES
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[30-231] disabled.

Q. Before the aneurysms. I'm sorry.

A. I was administrative assistant for services for seniors.

Q. What's that?

A. Where they – like Meals on Wheels for the elderly.

Q. Very well. Thank you, Ms. Soltero.

THE COURT: Mr. Smith?

MR. SMITH: Nothing further, Your Honor.

THE COURT: Very well. You may be excused.

THE WITNESS: Thank you.

THE COURT: You may not discuss this case or your testimony with anyone until after the trial.

THE WITNESS: Yes, sir.

Call your next witness.

MR. ROBERTS: Your Honor, at this time, we need to bring up something out of the presence of the jury.

THE COURT: Very well. The jury is going to be excused for the next few minutes.

(Open court; jury not present.)

MR. ROBERTS: Your Honor, there are a few things that need to be – from the Defense, we need to present testimony outside the record on Linda Howard, to show that she's under stress from these threats of [30-232] prosecution and whatever, and that she feels that it would affect her testimony. And even if she does testify, she's having a tough time dealing with it right now.

Also, there's the Government's Motion in Limine as to these threats. And I guess that could be handled at the same time, as to whether we can get into it before the jury.

It was the first matter I wanted to bring up before the jury, because I think the jury needs – it's – it is my opinion that the jury needs to be informed of this, so they can understand her state of mind while she is testifying, because she is going to be nervous, and she's going to – she's going to have problems.

There's jillions of facts in this case, and she's going to have problems. But anyway, I need to – I need to present her to –

THE COURT: Well, bring her in. Bring her in. Let's get it over with.

If you'll raise your right hand, please, to be sworn.

(Witness duly sworn.)

THE WITNESS: I do.

THE COURT: You may be seated.

[30-233] LINDA DESIREE HOWARD, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Ms. Howard, state your name for the record.

A. Linda Desiree Howard.

Q. Yes. And you've been employed – I'm just going to go through just a couple of things. You've been employed by me as an expert witness, both for consulting and for – if – for testifying, right?

A. That's correct.

Q. Okay. And we don't have a contract, but I'm paying you at $200 an hour?

A. That's correct.

Q. Right? We have a letter of engagement or something, where I agreed – or you said that was your bill, and I've accepted it.

A. That's correct.

Q. Right? Okay. And sometime during this case, you – it would have been – I believe it was, like, Wednesday of last week, I advised you that Mr. Smith had informed me the day before, and we were, like, meeting at – and you and I were meeting at lunch, right?

A. Correct.

Q. And that was the first time we had sat down in, [30-234] like, a day or so, right?

A. That's correct.

Q. And I said that the United States had said certain things about, one, prosecuting you for misprision?

MS. KANOF: Your Honor, at this time – I didn't mind the leading in the beginning, but this is –

THE COURT: I'll sustain the objection.

Q. (BY MR. ROBERTS) Okay. What is – okay. What – what is your understanding of – of– of the – and give us the full understanding of the threats that I was talking about with you.

A. I understood it to be three threats. Number one, that I had to have an attorney present in court, if I testified, when I testified; that I was instructed that I would be arrested for misprision, and I also would be arrested if I testified for perjury.

Q. Okay. But these were possibilities that could happen?

A. That way I understood it, that –

Q. If you testified?

A. Yes. That if I testified.

Q. Yeah. Now, at – I believe it was Monday of this week, did I indicate to you that there had been further conversations with the United States regarding possible perjury in regard to statements you had made [30-235] or may not have made about working for the FBI?

A. Yes, sir.

Q. Okay. Now, in regard to the first set of – of what I talked to you about the first –

MR. ROBERTS: And I'm just going to use the word threats, Your Honor, I mean, and this Court can determine whether they are or not.

Q. (BY MR. ROBERTS) Regarding these first threats, did you tell me that there was – there was problems in you testifying, that you may not want to testify?

A. I – I took the threat as a very meaningful threat. I was very scared, and I did say at that time, because of that, that I possibly didn't want to testify.

Q. Okay. And we spent – okay. When did you tell me, at least tentatively, that you thought you could testify, after the first set of threats?

A. I don't remember the specific, but I know it wasn't right away, because I had to talk to my husband.

I, basically, was very, very scared, and I don't think it was 'til towards maybe the end of the week, somewhere in that vicinity.

Q. Okay.

A. I don't know very – exactly.

[30-236] Q. Okay.

A. I know it wasn't immediately, though.

Q. Okay. Did you also want to consult with an attorney?

A. Yes, I did. And I did do that, in fact.

Q. Okay. And did you consult with him over the phone or in person?

A. At that time, I talked to him – I believe it was over the phone at that time.

Q. Okay. Have you later been able to talk to him in person?

A. Yes. I talked to him last night in person.

Q. Okay. And when I related to you that there had been allegations that Gary Weiser would say that you had told him that you had worked for the FBI, did that affect you?

A. Yes, sir. I feel like, for weeks straight, I feel like someone has had me in a room with a gun to my head.

Q. Okay. Now, do you know Gary Weiser?

A. I know Gary Weiser.

Q. How do you know him?

A. I had worked with Gary Weiser on another case.

Q. Okay. That was the Dr. Gifford case?

A. Dr. Gifford case, correct.

[30-237] Q. Okay. And that was another big medical mail fraud case, right?

A. That's correct.

Q. Okay. And did you respect Gary Weiser?

A. Very much so.

Q. Now, did you again tell me that you may not be able to testify?

A. Yes, sir, I did.

Q. And was that, like – was it, like, yesterday afternoon?

A. Yesterday.

Q. Afternoon?

A. Yes, sir.

Q. When we were sitting in there?

A. Yes, sir. And I attempted to call the attorney again.

Q. Okay. And since the first set of these threats, how many hours would you say you and I have been able to work on your testimony?

A. Maybe an hour and a half, unproductive.

Q. Okay. Have we discussed these threats far, far more than an hour and a half?

A. Basically, for – since last Wednesday, all of the time we've been together, less the hour and a half.

Q. Have you had lots of conversations with your – [30-238] with your husband?

A. Yes. Because, obviously, it affects – I have two children, and that affects my family.

Q. Okay. And I think you've already testified that you've had numerous conversations with your lawyer, okay?

A. That's correct. I was surprised to have to get an attorney.

Q. Now, in regard to that, did you guys call me, like, after 10:00 last night?

A. Yes, sir, we did, because I met with him again.

Q. And – okay. And was it a conversation back and forth on that?

A. Yes, sir, it was.

Q. Okay. Now, in regard to the specific item about whether you worked for the FBI, ma'am, have you ever been in a case working with the FBI?

A. Two cases.

Q. Okay. What is the first case?

A. We had an attempted abduction by bank robbers, who had come to our house, I believe it was in 19- – the summer of 1992, in that vicinity. And they held my

husband hostage and me hostage. They were going to take my husband to the bank to open up the vault.

The FBI came in the house, we – the plan fell [30-239] through, and the FBI came to the house and worked with us on that case with regards to these gentlemen who came to our house.

Q. Okay. And was that actually written up in the El Paso paper?

A. Yes, sir, it was.

Q. Okay. And were any of the agents involved in this case involved in that case?

A. I believe Agent Luz Sanabria. I think she was the agent who worked with – was Salinas – the Diaz and Salinas. That, I believe, was the same agent. The name seems familiar to the card that I have, which she gave me when they came out and talked to us.

Q. You're talking about Sanabria-Garcia, perhaps? Or Sanabria – well, okay. Well, let's not worry about names.

Now, the second – did you work with a second case with the FBI?

A. Yes, I did.

Q. And what did that case involve?

A. That was a drug case that the FBI asked – first approached my husband, and then he discussed it with me. And they asked us if they could put a camera on our home to observe a person that they suspected in dealing in drugs that lived on our block.

[30-240] Q. Did they place that on your roof?

A. Yes, sir. They did. And we had given them access to our home, to where they could change the videotape out, I guess, daily. I don't remember if it was daily, but I seem to think that.

Q. Do you remember if any of the agents in that case were involved in your case?

A. Yes, sir. Rolando. He was, I believe –

Q. That's Rolando Lopez?

A. Yes, Rolando Lopez. He was the agent that was Diaz in Dr. Bieganowski's patient list.

Q. Okay. You kind of remember him being involved in that scenario?

A. Definitely, yes.

Q. Okay. So could you have told somebody you worked with the FBI on one occasion?

A. Yes.

Q. Okay. Now, but to your recollection, to your best recollection, have you ever told anybody, I worked for the FBI, I mean, I've been employed by the FBI?

A. I might have, but I don't remember. And I don't think I would have said it that way. But – you know, this is nine years.

Q. Okay. Now, ma'am, today, right at this moment, can you tell us how you feel emotionally about [30-241] testifying?

A. Emotionally?

Q. Yeah.

A. I feel like I don't have my capabilities, my head is so very clouded. I'm scared. I'm very confused. Physically, it's affected me. Healthwise, I'm a wreck.

Q. Okay. Now, healthwise, are you suffering from stress problems?

A. I feel like my heart could come out of my chest.

Q. Okay. But have you had any specific physical problems that could or could not be related to stress that you've been suffering from, like, perhaps, even before this? Or can you –

A. Up until – up until – after 1997, from '97 on, I really haven't had –I mean, prior to that –

Q. Yeah. Okay.

A. – I had a lot of deaths. We had the abduction. I became – I became ill and had major surgery.

Q. Yes.

A. And I feel like how I felt when all those things happened to me. I feel like I've been brought to that point in time.

Q. Okay. Do you believe that you – that – you know, mentally speaking, that you – that you may [20-242] forget things or mistake things because of your emotional state?

A. Definitely. I'm – I'm very clouded.

Q. Okay. And would you – would you like more time to consult with me about, actually, you testifying?

A. Yes, sir.

MR. ROBERTS: Your Honor, could I have a second?

THE COURT: You may.

MR. ROBERTS: I pass the witness, Your Honor.

THE COURT: Ms. Kanof?

CROSS-EXAMINATION

BY MS. KANOF:

Q. Ms. Howard, I'm a little confused. I never – I talked to Mr. Smith, and I never threatened you. I never used the word arrest, that you would be arrested. I never said that.

Did they tell you that?

A. No. I think when I'm told perjury, from what I know of perjury, that is usually when you're arrested. So when I'm told perjury, that's what it means to me, that I lied in court.

Q. And what did they tell you was my concern about perjury?

A. They didn't detail it. They told me that you had said, should I testify, that – you know, perjury. [30-243] and so that was my concern.

Q. Okay. Ms. Howard, that's not true. I specifically discussed one particular element of the case when I referred to perjury. I did not say perjury in general. Did they not tell you that?

A. I was told that should I tes – that you had said, should I testify, then I should have a lawyer present in court when I testified – misprision and perjury.

Q. What did they tell you a misprision was?

A. Misprison [sic], that – the way I understood it, and I can't say it word-for-word, because now I'm so messed up because of this, I don't remember word-for-word. But how I still – how I think I remember now, is that if you know something is wrong – that someone is doing something wrong in the past and you don't report it to the Government, then you could be in trouble or arrested for not having reported it. That's not how they worded it; that's how I understand it.

Q. And then did they discuss attorney/client privilege with you?

A. I always understood I was under attorney/client privilege.

MR. ROBERTS: Your Honor, can I be excused for one second. I have to get Mr. Smith.

[30-244] THE COURT: You may.

A. I always understood that I –

MR. GARCIA: I don't believe both Defense Counsel can be out at the same time.

THE COURT: Yeah, you're right. Mr. Roberts, I thought Mr. Smith was here. You have to stay in here until Mr. Smith comes back.

MR. RAMOS: May I be excused for a second, Your Honor?

Q. (BY MS. KANOF) Okay. Go ahead, ma'am.

A. I'm sorry. Would you please reword the question?

Q. Yes. Did – first of all, did they tell you I was mad?

A. Did they tell me you were mad? No, I don't' think so.

Q. Okay. Did they tell you that I told them that I thought I had an ethical duty to relate to them what I had learned in the discovery they had given me the night before?

A. Specifically, again, I'm not remembering much, Ms. Kanof, if they did. I wouldn't remember it right now.

Q. Okay. Did they tell you that I assured the Judge, once I had received the discovery, that you would not be charged with a misprision?

[30-245] A. Again, I'm just – this has all just kind of messed me up. Like I said, it's taken me back where – I had begun to heal from some bad years. It's taken me back to those years.

Q. Well, let me ask you this, Ms. Howard: You came, and the Judge told you – do you remember when you were here when the Judge talked to you?

A. Yes, and I was – I was a little bit better, but when it got resaid again, that it was reemphasized with Mr. Weiser, it just kind of threw me again.

Q. What did they tell you about it being reemphasized with Mr. Weiser?

A. That it had been mentioned that Mr. Weiser or that you had – that Mr. – you – and again, I'm just not

there – that it had been said something about perjury, and that Mr. Weiser – or you had somebody that was going to say that I had said I worked for the FBI.

Q. Okay. Ma'am –

THE COURT: Who told you – who told you that?

MS. KANOF: Yeah.

THE COURT: Who told you that?

THE WITNESS: Who told me?

THE COURT: Yes.

THE WITNESS: I believe it was Mr. Roberts.

[30-246] THE COURT: It's your own doing Mr. Roberts.

MR. ROBERTS: What? Excuse me? I had to tell her that, Your Honor.

THE COURT: Read the record.

MR. ROBERTS: What?

THE COURT: Look what she stated. Read the record.

MR. ROBERTS: I – I did read the record. Ms. Kanof –

THE COURT: Do you have anymore questions?

MS. KANOF: Yes, I do.

THE COURT: You may be seated. Go ahead.

Q. (BY MS. KANOF) Ms. Howard, what happened is that I filed a motion, and in that motion, I explained to the Court what evidence – or some of the issues, explaining why I came forward to your attorney. I have not spoken with your attorney. I've never mentioned perjury to him again.

MR. SMITH: Objection, Your Honor. This is not – we're not the attorneys. We are not her attorney.

THE COURT: I'll sustain the objection.

Q. (BY MS. KANOF) I have never spoken – who's your attorney?

A. Jim Darnell.

Q. Okay. I've never spoken to Mr. Darnell about [30-247] this. So let me talk about the Counsel for Dr. Bieganowski. I never brought up the issue again to them. I don't know why they told you that. But what I did was, I explained what Mr. Weiser had said, in a motion to the Court. And I don't – I don't know how they interpreted that to you, Ms. Howard, but I want to assure you I did not do that.

Now –

MR. ROBERTS: Your Honor, is Ms. Kanof testifying?

THE COURT: I'll sustain the objection.

Q. (BY MS. KANOF) Okay. Ms. Howard, Mr. Weiser hired you to consult on Dr. Gifford, correct?

A. No, I – I don't remember specifics, and I don't think Mr. Weiser hired me. I think I was originally – and I

could be not exact on this. But I think originally I was working for Mr. Darnell. I think he was the original attorney, or something, that somehow he got off the case, and then it went to Mr. Weiser. So I kind of just flowed through in that.

Q. Okay. And all I did, in the memo to the Court in the motion, was tell the Court what Mr. Weiser told me. And you feel threatened by that?

A. Ms. Kanof, actually, I feel threatened – not so much this last, but by the first. That has totally set me, like I said, just beyond means.

[30-248] Q. Well, Mr. Weiser also told me that he couldn't get you to testify in his case, in the Gifford case, also. Do you remember that?

A. He never asked me to testify. He told me – I was expecting to testify, and I thought I would. But Mr. Weiser told me he didn't want to use me in that case for certain reasons.

Q. So if Mr. Weiser –

MR. ROBERTS: Your Honor – just one second. Ms. Kanof is consistently testifying outside the record.

THE COURT: I'll sustain the objection, Mr. Roberts.

MS. KANOF: Okay.

THE COURT: And we don't have to go anymore into Mr. Weiser, Ms. Kanof.

Q. (BY MS. KANOF) Okay. So it's not really this thing with Mr. Weiser that's upset you?

A. That has added to it. But the other just was – just a major focal. And this has kind of like just added somewhat to it.

Q. Okay. Let me – let me explain to you: The Judge reassured you, and I am now going to reassure you, that because –

MR. ROBERTS: Your Honor, I would object.

[30-249] THE COURT: Overruled. Overruled. I want the reassurance on the record.

MS. KANOF: Thank you.

Q. (BY MS. KANOF) That –

MR. ROBERTS: Your Honor, this Court – my feeling was, when she was outside – I just need to state the objection, Your Honor. When she was outside this court with this, this Court told me that this Court could not promise me that she would not be indicted.

THE COURT: I didn't say that.

MR. ROBERTS: That was from the Court.

THE COURT: I didn't say that. I don't remember saying that.

Let's have it for the record, Ms. Kanof.

Q. (BY MS. KANOF) Okay. After I spoke with Mr. Smith – and again, Ms. Howard, I didn't threaten you. I did what I was obligated to do. But after I spoke with Mr. Smith, I received discovery.

Did you participate in putting that stuff together?

A. I didn't put it together, no. I didn't. That was my – my work.

Q. You provided it for them?

A. That's correct.

Q. Okay. And you know they have to give it to us, [30-250] right?

A. Yes, that's correct.

Q. Okay. And in what they gave us, there are three letters from you to Mr. Darnell.

Do you recall those three letters.

A. Yes, I do.

Q. Okay.

A. I know there were some. I don't know if there's three, specifically.

Q. Okay. Some letters. Okay?

A. Right.

Q. And in those letters, in addition to what you told Mr. Darnell about Dr. Bieganowski's medical practice, you were also asking him to bill for you. Do you recall that?

A. No. When Mr. Darnell asked me to originally work for him, he told me I was to bill him. That was – that was because I was working for him.

Q. Okay. And that's what those letters basically said, right?

A. No, ma'am. I believe we discussed other issues. I don't remember that being in those letters. I – you know, again, we're talking four or five years.

Q. Okay.

MS. KANOF: May I approach the witness, [30-251] Your Honor?

THE COURT: Hold on a second.

(Court reporter changing paper.)

THE COURT: You may approach the witness.

MS. KANOF: Thank you, Your Honor.

Q. (BY MS. KANOF) Let me show you, first, your letter of April 20th, 1995. Is that your signature at the bottom?

A. Yes, it is.

Q. And does it say, "Dear Jim"?

A. Yes, it does.

Q. And does it say, "Per my conversation with you yesterday regarding the unprofessional manner in which I was treated, this letter is written confirming that as of 4/27/95, I will no longer assist any further with Arthur Bieganowski, M.D.'s billing entries."

Is that correct?

A. That's correct.

Q. Okay. Now, in the second paragraph, doesn't it say, "I will be more than happy to meet with you; however,

any billings from this date forward will be at my regular hour of $100 an hour"?

A. I don't understand what you're asking me now. That's worded, but what was your question?

Q. My question is that these letters reflect billing [30-252] on – for your services provided through Mr. Darnell to Dr. Bieganowski?

A. I'm sorry –

THE COURT: Do those letters – does that letter indicate that you were working for Mr. Darnell?

THE WITNESS: Yes, it does.

Q. (BY MS. KANOF) Okay. And this second letter, dated June 21st of 1996 – you do go back to work at Dr. Bieganowski's, correct?

A. That's correct.

Q. Okay. And you're reporting to him the problems that you see, correct?

A. To Mr. Darnell. Yes.

Q. Yes. And then this letter dated October 22nd of 1996, again, you're reporting some of the problems that you found at Dr. Bieganowski's to Mr. Darnell, correct?

A. That's correct.

Q. And then this letter of October 14th of 1996 has all your billings, correct?

A. Correct.

Q. Okay. Okay. Conversation with LeAnne at Darnell's, conversation with LeAnne, conversation with Lucy, right?

A. Correct.

[30-253] Q. And this is a representation, at least for October 14th of 1996, of the work you had done at Dr. Bieganowski's which you were billing, correct?

A. To Mr. Darnell, correct.

Q. And – well, this – you didn't think this was coming out of Mr. Darnell's pocket, did you?

A. I – I don't know who – you know, that's not something that I'm really concerned with knowing. You know, I would think, like, when Mr. Darnell bills for a client, he bills for that, you know –

Q. You don't –

A. – on this bill. I don't – I don't know how he does that, or the mechanics. All I know is that I bill – I would – I billed him, and he paid me.

Q. Okay.

A. And, you know, if – that was between him and Dr. Bieganowski.

Q. Okay.

A. That wasn't my concern.

Q. Okay. Now, once I had received these letters last Wednesday – and by the – by the way, I communicated Wednesday morning with Mr. Smith, not Tuesday morning.

Once these letters came to my attention late Wednesday night and I reviewed them, then I recognized that you were reporting to Mr. Darnell, and you may [30-254] have been in a privileged relationship.

Do you understand that?

A. I was – I was concerned because, when your agents came out to give me the subpoena, Ms. Hivic and Mr. Griego, I had advised them a long time before that that I had worked for the attorney for Dr. Bieganowski, and I was under attorney/client privilege.

And they informed me that that was no longer correct. So that's –

Q. But Mr. Darnell was not the attorney anymore, correct?

A. But that I had worked – that I had worked for the attorney. Specifically, they didn't ask me one attorney or another. I said I had worked for an attorney, and I was under the understanding that I was under attorney/client privilege. So I notified them long before that, that – they knew I was working for the attorneys.

Q. Well, Ms. Howard, on February 29th, that is just two weeks before this trial, when they told you Jim Darnell was not Dr. Bieganowski's attorney, you were surprised, weren't you?

A. No. No. As a matter of fact, the agents had been out to my practice I believe in – about a year before [30-255] that. And they were looking for me at that time. And I – at that time is when I found out that Mr. Darnell was not the attorney. I knew it was Mr. Smith, because I called

Mr. Darnell, and he told me he was no longer the attorney, and that David Smith was.

And I placed a phone call, because the agents told the doctor, because I was not at work that day, that I needed to call them – I think it was Agent Griego. And I called Mr. Smith, and he said, yes, that there were some things that they were – that was going on.

And I called him back, I think, later, to see if he called Mr. Griego, because Mr. Griego asked me to return the call. He said he had not. So I believe I called Mr. Griego a year before that and responded.

And he asked me, I just need to know if I was working for an attorney at that time. So I've made it aware a long time to a lot – to – to several people.

Q. You've also made it aware to a lot of people that you worked for the FBI, haven't you?

A. That I worked for – with the FBI.

Q. No, for the FBI.

A. I might have, but I don't remember. And – you know –

Q. Well, didn't you tell one of your coworkers –

[30-256] MR. ROBERTS: Your Honor, I think the witness should be able to finish her answer.

THE COURT: Well, I'll sustain the objection.

Q. (BY MS. KANOF) Go ahead. Are you finished with that answer?

A. Go ahead.

Q. Didn't you tell one of your coworkers at Dr. Blair's that you performed an audit for the FBI?

A. No. I – what I have said – and this gentleman you're referring to, I would like to be able to present some history on him, so you understand who's told you this information.

When I hired him at the practice, I had heard – and I did talk to him about having had problems, work problems in the past, and maybe, you know, alcohol, things like that. So – and maybe that's his interpretation. But I – but what I had said was that I had done an audit for Dr. Bieganowski's lawyers.

What I call an audit might not actually be an audit. That was just a simple version of me saying I had done some work, not, you know, necessarily going in and doing that function.

Q. But even you admit, in the past, you may have told people you worked for the FBI?

A. I – I – I'm not remembering every little word [30-257] I'm sorry. It's been a lot of years, and I've had a lot of things happen to me in my personal life. So –

Q. Well, let me put it this way, Ms. Howard. Can you understand that if five different people related to the Government that you had said that you worked for the FBI, and we knew you hadn't, that we would be concerned that if you testified to that here in the courtroom, you would not be telling the truth?

A. I would think you would have approached me long before this, since, obviously, you came out to my medical practice a year ago, and then you came out weeks before

the trial started. I would have thought that maybe – and since I had worked on these other cases and – you know, that maybe I would have been confronted with these issues by you long before this.

Q. You worked on these other cases?

A. Worked with, on these other – I – again, wording. I worked with.

Q. Okay. Ms. Howard, let me reassure you, based on the discovery I was given, I saw you were reporting to Mr. Darnell. And I will represent to you that, based on the information I'd gotten before this, I did not believe you.

But when I saw that you were working in a privileged relationship, although it is – I will tell [30-258] you it's my opinion that you breached that relationship four years ago, when you told coworkers what you had done at Dr. Bieganowski's, which is a violation of privilege. But nevertheless, I made the decision on at that time –

MR. ROBERTS: Your Honor, I would object. This is testimony.

THE COURT: Overruled.

Q. (BY MS. KANOF) I made the decision at that time that somebody might have told you you had a privileged relationship, and that there would be no way that I would charge you with a misprision of a felony, even if you did know that Dr. Bieganowski had committed fraud and had told people that.

So let me assure you now, I am granting you immunity. The only way an Assistant United States Attorney can is through a Grand Jury, but – or through a letter. But

I'm orally telling you that you will not be prosecuted for anything that you knew about and did not report at Dr. Bieganowski's.

Do you understand that?

A. I understand that.

Q. And as far as perjury is concerned, ma'am, I never said that I would prosecute you or arrest you for perjury. What I said was, if you got on the stand and [30-259] represented you had worked for the FBI, knowing that you didn't, you would be committing perjury. I never said what I would do about it.

Do you understand that?

A. I understand that.

Q. Do you understand that if at any time you testify and do not tell the truth knowingly, that it can be perjury?

A. Now, with my mind, knowingly, I'm confused, Ms. Kanof, with what's happened to me.

Q. You have so far earned $16,000 in this case, correct?

A. Right now, I believe – I believe that's correct.

Q. Okay. And you charge $200 an hour?

A. That's correct. I've done a lot of work.

Q. That's least 80 hours, correct?

A. That's correct.

Q. And –

A. And I haven't charged for a lot of hours I've been doing. I'm not billing it. So I've done way in excess of those hours.

Q. Okay. Well, why aren't you billing?

A. I – I'm not of the understanding that I'm able to bill unlimited.

Q. Okay. So is $16,000 all you're going to get for [30-260] the case?

A. I – I – I estimated my time at around 20,000.

Q. Ms. Howard, what can I do to reassure you that you will not be charged and – with the misprision in this case?

A. Ms. Kanof, I understand that. However, because of this, and your authority and power, I'm afraid to even walk backwards at this point in time.

MS. KANOF: Pass the witness.

THE COURT: Mr. Roberts?

REDIRECT EXAMINATION

BY MR. ROBERTS:

Q. Ms. Howard, along with the hours that you've spent, part of those hours have been spent reviewing your documents, right?

A. That's correct.

Q. And there's lots of documents in this case, right?

A. Massive amounts.

Q. Okay. And we gave a kind of rather large box to the Government of records that you could find, right?

A. That's correct.

Q. And, basically, the rest of those hours have been spent with you sitting in court while their experts testified, right?

A. That's correct.

[30-261] Q. And then – and then just thinking and reviewing about this case, right?

A. That's correct, because I'm dealing with a lot of rules and regulations.

Q. Yes.

A. And dates and times.

Q. Different CPT codes and different dates and all that, right?

A. Correct.

Q. It's complicated. Okay. Now, I would like to be marked –

MR. ROBERTS: And I don't know what exhibit I'm on, and I need a staple, if I could, Your Honor. I seem to have lost my exhibit stickers again. I don't know what it is. I've submitted it.

THE COURT: B-15 is the next one.

MR. ROBERTS: B-15? I will make it B-15, Your Honor.

THE COURT: For the record?

MR. ROBERTS: It's just – yes, for the – no. It – well, for the Court; for the record for the Court.

THE COURT: All right.

MR. ROBERTS: This is – this is – this is the – it's referred to in other places, which we will submit [30-262] tomorrow. I just – for some reason, I only have two – two things. But they – they were submitted earlier to the Court in our motion for mistrial, submitted on Monday or so, but they are reports given by Lucy Campos actually detailing, okay, the – the relationship – the attorney/client relationship of – and I'm just going to use a paper clip, if I can take it from the Government, but I'm giving it back, by handing it to the Court – of where it details her relationship. And the Government's had possession of this since September of 1998.

THE COURT: B-15 will be admitted for the record only.

MR. ROBERTS: For the record only.

Q. (BY MR. ROBERTS) And you, of course, were aware of that, right, that the Government has known that you at – least through this 302 of Lucy Campos – that you were working for Darnell. You've reviewed the 302s, have you not, ma'am?

A. Yes, I have.

Q. And that's part of the 80 hours that we're talking about?

A. That's correct.

Q. Is going over all of those 302s?

A. That's correct.

[30-263] Q. And you've – you've – did the agents indicate that they knew that you had worked for an attorney, when they came to you to serve this subpoena?

A. Yes, they did.

Q. And about – what is the time frame of serving this subpoena?

A. Oh, a week, two weeks before the trial started.

Q. Before the trial started?

A. Somewhere in that vicinity.

Q. And that's even before you were hired, right?

A. That's correct.

Q. Okay. And then – and I believe it's your testimony, and I just want to make sure I get it right. They told you that your – your – your protection had lapsed because you no longer worked for the attorney, or something like that?

A. I told them, when they served me the subpoena, that I had worked – I was – had worked for the attorney, and I believed I was under attorney/client privilege.

Q. Yes.

A. And they told me that that didn't apply.

Q. Why? Did they tell you – did they tell you it didn't apply?

A. Ms. Hivic did most of the talking for Mr. Griego.

[30-264] Q. Yes.

A. She said some things. I believe they – they did, but I – I –

Q. If you can't recall, that's fine.

A. I just can't recall it now.

Q. Okay. Now –

MR. ROBERTS: I have nothing further, but I have one more witness to present.

THE COURT: You have one more witness?

MR. ROBERTS: Yeah, Mr. Smith.

THE COURT: You may be excused, ma'am.

MS. KANOF: Wait, I – I have more questions.

THE COURT: Oh, I'm sorry.

RECROSS-EXAMINATION

BY MS. KANOF:

Q. Ms. Howard, when did you start working for Mr. Roberts in this case?

A. I had talked to Mr. Smith the year before, when Mr. Griego came out. But physically doing hands-on work?

Q. Yes, ma'am.

A. I don't remember the date. I would have to, you know –

Q. Before or after –

A. – try to figure it out.

* * *

APPENDIX "H"

[Defendant's Exhibit B-15]

Continuation of FD-302 of CAMPOS On 9/17/98 Page 2

being reimbursed for the referrals he was making to ALLIANCE.

As a medical director at SOUTHWESTERN GENERAL HOSPITAL (SGH), CAMPOS stated that DR. BIEGANOWSKI was paid $10,000.00 a month in medical directorship fees at DR. BIEGANOWSKI's direction, CAMPOS stated that she would sometimes call an accountant working at SGH to inquire about his money if it was late getting to him. When the check in question was ready, CAMPOS stated that she would go to SGH and pick it up. CAMPOS did not know what DR. BIEGANOWSKI did at SGH to earn the directorship fees. CAMPOS stated that DR. BIEGANOWSKI treated many of his patients at SGH. DR. BIEGANOWSKI never mentioned attending board meetings at SGH to CAMPOS. CAMPOS did recall seeing DR. BIEGANOWSKI's name on the "On Call" list at SGH during one of her visits to the hospital to pick up one of his checks.

Before he began referring patients to ALLIANCE and SGH, CAMPOS stated that DR. BIEGANOWSKI sent many patients to TIGUA HOSPITAL, formerly YSLETA HOSPITAL.

CAMPOS stated that LINDA HOWARD was hired by JIM DARNELL on or about October of 1994. As DR. BIEGANOWSKI's attorney, CAMPOS stated that DARNELL hired HOWARD to look at the overall billing practices of his (DR. BIEGANOWSKI's) medical entities. CAMPOS recalled HOWARD was paid $100.00/hour for

her services, and that her fee was eventually paid by DR. BIEGANOWSKI. CAMPOS learned what HOWARD was earning after reviewing invoices for her services submitted by DARNELL to DR. BIEGANOWSKI on his (DARNELL) business letterhead. CAMPOS added that she prepared checks made payable to DARNELL for HOWARD's services. CAMPOS believed DARNELL would then pay HOWARD. CAMPOS recalled that DR. BIEGANOWSKI paid HOWARD $18,000.00 for 180 hours of work.

CAMPOS stated that HOWARD claimed to be one of only five Current Procedural Terminology (CPT) Coding Specialists certified in the United States. Because she (CAMPOS) did not consider herself a coding expert, CAMPOS stated that she was happy when she learned HOWARD would be coming in to observe DR. BIEGANOWSKI and the billing practices of his medical entities.

Along with watching DR. BIEGANOWSKI while he and his [page 3] medical assistants were treating and evaluating patients, CAMPOS stated that HOWARD spent many hours going over the billing records of all of DR. BIEGANOWSKI's medical entities. While going through these billing records, CAMPOS stated that she would often observe HOWARD grimacing and making faces. CAMPOS stated that HOWARD did not share the results of the reports she prepared and provided to DARNELL.

CAMPOS stated that she was asked to attend a meeting where HOWARD made several recommendations with respect to patient evaluations and billings. CAMPOS stated that DR. BIEGANOWSKI and RICHARD GOLDBERG also attended the meeting. With regards to the

progress notes DR. BIEGANOWSKI and his assistants were preparing which documented the results of a patient's examination or treatment, CAMPOS stated that HOWARD suggested they be more precise. HOWARD indicated that medical documentation, including a patient's history, could use improvement. CAMPOS recalled HOWARD also mentioning that a physician's face to face time with a patient started once that patient was placed in an examination room.

Although it may not have been in the aforementioned meeting, CAMPOS recalled HOWARD saying that DR. BIEGANOWSKI should not have been billing high level CPT Codes as often as she had observed in his billing records for high level or comprehensive office visits of established patients. CAMPOS stated that HOWARD indicated these high level codes should have been billed maybe once every three weeks.

CAMPOS provided the interviewing Agents with computerized printouts entitled as follows:

1) Procedure Report by Code, ARTHUR C. BIEGANOWSKI, M.D., Procedure: 500-[E];

2) Diagnosis Report by Code, ARTHUR C. BIEGANOWSKI, M.D., Diagnosis: 0-99999;

CAMPOS stated that many of the changes recommended by HOWARD regarding DR. BIEGANOWSKI's billing practices were made based on her review of the aforementioned reports. CAMPOS stated that HOWARD's writing was reflected throughout the reports provided, including reference to high level office visit codes

APPENDIX "I"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	EP-98-CR-959-DB
vs.	)	
ARTHUR C. BIEGANOWSKI (1) RICHARD J. GOLDBERG (3) GUSTAVO DIAZ (6) JESSE JAIME LOPEZ (7) GUADALUPE RODRIGUEZ MORALES (9)	)	El Paso, Texas
	)	April 6, 2000

VOLUME 24 OF 43 VOLUMES
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[24-237] I'm looking for September 17th. I'll show you the statement where you were discussing Linda Howard. Do you remember telling Agent Griego that she claimed she'd worked for the FBI?

A. I don't see it on here.

Q. Is it possible you didn't tell him that?

A. It doesn't look like they have it on here, but I know I told him.

Q. Okay. Were you aware of what – you are aware that Agent Griego was from the FBI, right?

A. Yes.

Q. Okay. Now, Ms. Campos, how – Linda Howard did what with your office, from your understanding?

A. She came in to redo the CPT coding, the ICD-9 coding –

Q. Yes.

A. – and to observe the goings-on in the clinic and make modifications in the billing and progress notes.

Q. Now, it was explained to you – did you meet, in connection with Linda Howard, an attorney by the name of Jim Darnell?

A. I already knew Mr. Jim Darnell.

Q. Okay. But did he introduce and explain that Linda Howard was working for him and that – and she was going to work on the CPT codes in the office?

[24-238] A. I knew that Linda Howard – when the first billing came from Mr. Darnell, that the check was made out to Mr. Darnell for Linda Howard's services.

Q. Okay. Let me try to ask that question again. Did Mr. Darnell explain that Linda Howard was working for him and would be working on the office to work on the CPT codes?

A. Explain it to me?

Q. Yes.

A. No, he never explained it to me.

Q. Okay. But you do now remember that there was a billing?

A. Yes.

Q. Where Darnell was billing for both his – I would assume his work –

A. Yes.

Q. – and for Linda Howard's work?

A. Right.

Q. As working under him?

A. Right.

Q. So when you testified earlier that Linda Howard was Dr. Bieganowski's employee, that wasn't quite true?

A. I didn't – she was employed – she was his employee. I said that Dr. B – Dr. B paid Linda [24-239] Howard, whether it be through Mr. Darnell, but he paid for her services. That's what I meant.

Q. Okay. And actually, I think over the long run, she was paid about $18,000, from your recollection?

A. She was paid $100 an hour.

Q. Yes.

A. I don't recall. Approximately, maybe, $18,000.

Q. Could you have told the FBI, back in September of '98, that it was 18,000?

A. I might have used an approximate amount, yes.

Q. Okay. I suppose that would be part of Dr. Bieganowski's overhead, too?

A. Yes.

Q. Okay. Now, in regard to Ms. – Ms. Howard's work –

MR. ROBERTS: Just a second, Your Honor.

Q. (BY MR. ROBERTS) Do you remember a meeting that you had with Linda Howard in 1995, going over the denials of payments and what's called an "EOB," or "EOBs"?

A. I'm sure I discussed with Linda Howard EOBs. That would have been something to do with her.

Q. Yes. And what is an EOB?

A. Explanation of benefits.

Q. Okay. And is your memory that you-all did have a

* * *

[24-313] guideline manual.

Q. Okay. That would be the blue book that's up there in front of you?

A. Correct.

Q. Okay. Did you ever go to any seminars?

A. I went to one seminar, and it was mainly targeted towards workers' comp and fee guidelines for the employer, but not for – but not to this, no.

Q. Okay. Did you intend to go to one that was geared more to the healthcare provider, but it turned out that it wasn't?

A. Right.

Q. Okay. So you never went to a seminar that had information for healthcare providers on how to understood [sic] the use of the codes?

A. No.

Q. Okay. Before Linda Howard came along, was there anyone else that you ever got help from?

A. No.

Q. Okay. I take it – Linda Howard, I think you said that you saw that she was being paid through Jim Darnell?

A. Right.

Q. Do you know if it was his suggestion that she come in?

[24-314] A. I don't know whose suggestion. But when I was told about it, I was all for it. I wanted her to come in.

Q. Right. You were very happy to have that responsibility – or you did get some help in that area, right?

A. Yes, I did.

Q. Okay. Government's Exhibit 698. Do you have that one up there? It's the one that's – it's a computer printout with some of your notes on it.

A. Yes.

Q. Okay. I think you said that the notes were notes that you made when you were talking to Linda Howard?

A. Right.

Q. Okay. In the top left corner up there – and that's all your handwriting on it, right?

A. I'm sorry?

Q. Is that all your handwriting?

A. Yes.

Q. The handwritten portions?

A. Yes.

Q. Okay. On the top left corner, at least of what I'm looking at as the top page, it says, "Get fee guideline book for PI"?

A. right.

* * *

APPENDIX "J"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	EP-98-CR-959-DB
vs.	)	
ARTHUR C. BIEGANOWSKI (1)	)	El Paso, Texas
RICHARD J. GOLDBERG (3)	)	
GUSTAVO DIAZ (6)	)	
JESSE JAIME LOPEZ (7)	)	
GUADALUPE RODRIGUEZ MORALES (9)	)	April 10, 2000

VOLUME 25 of 43 VOLUMES
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[25-54] the account, right?

A. Regarding – sometimes even prescriptions were put in there.

Q. Okay.

MS. STILLINGER: Your Honor, I don't have any objection.

THE COURT: Anyone else? I take it there are none. Government's Exhibits 59 and 60 will be admitted.

REDIRECT EXAMINATION (Cont'd.)

BY MS. KANOF:

Q. Ms. Campos, who told you Linda Howard was an expert?

A. She did.

Q. Did anybody else make that representation to you?

A. No.

Q. And based on her representation, and the fact that Dr. Bieganowski's lawyer had provided her, you believe she was an expert, correct?

A. Yes.

Q. You didn't know what her experience was, did you?

A. She told me herself that –

Q. Aside from what she told you.

A. Right. No.

Q. Were there checks and balances in your computer.

* * *

APPENDIX "K"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**NO. EP-98-CR-0959**
ARTHUR BIEGANOWSKI, M.D.	§	

EX-PARTE MOTION TO APPOINT EXPERTS OR TO RELEASE FUNDS TO HIRE EXPERT WITNESSES AND CONSULTANTS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW ARTHUR BIEGANOWSKI, M.D., Defendant in the above captioned matter and files this his Motion to Appoint Experts or to Release Funds to Hire Expert Witnesses and Consultants.

I.

Restraint

Arthur Bieganowski, M.D. is currently being held in the El Paso County Detention Facility without Bond. Because of this holding Arthur Bieganowski is unable to practice medicine and procuring any income to use in the procuring of services for necessary experts and consultants to assists [sic] him in preparing an adequate defense in this cause.

II.

Seized Assets

The Assets that Arthur Bieganowski normally would have at his disposal to use in his defense has [sic] been seized or frozen, denying him the use of same.

III.

$172,000 for Defense and Family Maintenance

The Government had allocated the release of one hundred seventy-two-thousand dollars ($172,000.00) for legal representation and family maintenance. These funds are inadequate for proper representation in that this case as stated by the Untied States Attorney's Office is a complex case dealing with hundreds of thousands of pages of documents requiring over four years to investigate by crack troops of the F.B.I., IRS, and the United States Attorney's Office.

The expenses incurred to date for Defense are as follows:

Amount of Expense:	**Expense Paid to:**
$70,000.00	**Charles L. Roberts for Attorney Fees**
$30,000.00	**H. Davidson Smith, III for Attorney Fees**
$20,000.00	**Copies of Discovery; and other miscellaneous expenses**
$ 1,000.00	**Accounting Services to date**
$ 1,000.00	**Storage Fee**

In addition family maintenance has cost $50,00 [sic] to date. The assets allotted of the Government to Arthur

Bieganowski, have been exhausted. Yet it is necessary for an adequate defense that Arthur Bieganowski have numerous experts be appointed to assets [sic] in his defense.

IV.

Necessary Experts

CODE EXPERT

It would be necessary to appoint a code expert to assist counsel in the understanding [sic] the complex matter [sic] that make up the world of medical billing. Counsels for Arthur Bieganowski are not knowledgeable in this area. Counsel must be properly schooled in this area to properly prepare an adequate defense for Arthur Bieganowski as well as prepare for cross examination of government's numerous witnesses in this area.

It is necessary to secure the services of LINDA HOWARD an expert in medical coding to bring counsels for Arthur Bieganowski up to speed in this area. Mrs. Howard has an expertises [sic] in medical billings and has assisted numerous medical practitioners in the El Paso area with developments of proper medical billing procedure.

In addition Mrs. Howard could assist Defense counsel with understanding the workings of Dr. Arthur Bieganowski's practice.

LEGAL EXPERT ON CODES

Due to the complex nature of the allegation and the subject matter of same it would be necessary to secure the services of an attorney on the trial term who has a working knowledge of the Codes used in Medical billing.

Without this key team member it would be impossible to properly cross examine the experts called by the government thus depriving Arthur Bieganowski a fair opportunity to prepare his case and denying him the right to a vigorous cross examination of the Government's witnesses.

RIC ROBINSON, ESQ. is an attorney practicing out of Washington D.C. and is considered one of the premier litigators in this area.

Mr. Robinson has reviewed the Indictment in the instant case and feels his attorneys fees in this complex case would range anywhere from Two hundred-thousand ($200,000) to Three hundred-thousand ($300,000) dollars.

CERTIFIED PUBLIC ACCOUNTANTS

It would be necessary to retain a forensic accountant to assist counsel in the preparation of this cause due to the large number of documents.

Additional [sic] a consulting accountant will be need [sic] to assist in the preparation of the defense case.

COMPUTER ANALYST

Due to the huge volume of documents it will be necessary to catalog all documents. It will be impossible to do so without the help of an individual well trained in this area. To go to trial in this case without proper indexing would deny Arthur Bieganowski of the right to an adequate defense.

PRIVATE INVESTIGATOR

An Investigator is necessary to assist in reviewing documents and developing the defense case.

EXPECTED COST OF EXPERTS

Code Experts	$200,000.00 to $300,000.00
CPA	$150,000.00 to $300,000.00

V.

Governments Release of Assets

At the time of Arthur Bieganowski [sic] incarnation [sic] he was a successful practitioner of the medical arts treating thousands of El Pasoans. Since his detention he has not had the luxury of earning a living. All of Arthur Bieganowski's assets have been frozen or seized by the government. It would be necessary to release these assets so that Dr. Bieganowski may adequately defend himself and have those experts that are necessary to assist him in same.

This motion is not made for the purpose of delay but in the interest of justice.

WHEREFORE, PREMISES CONSIDERED, Arthur Bieganowski prays that this Court grants this Motion to Appoint Experts or Release Assets.

Respectfully submitted,

By: /s/ H. Davidson Smith, III
H. Davidson Smith, III
State Bar No. 18722000
1006 Magoffin Avenue
El Paso, Texas 79901
Telephone: (915) 533-5551
Facsimile: (915) 545-2485

CERTIFICATE OF SERVICE

This is to certify that on July 2, 1999 a true and correct copy of the above and foregoing document was served on the Assistant United States Attorney, Debra Kanoff, 511 E. San Antonio, El Paso, Texas, by hand delivery.

/s/ H. Davidson Smith, III
H. Davidson Smith, III

AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

BEFORE ME the undersigned authority, on this the 2nd day of July, A.D., 1999, appeared MICHAEL R. GIBSON, who after being by me duly sworn, deposed and stated the following:

> I recently had the honor of representing Dr. Anthony Valdez, a Physician of the City of El Paso, Texas, in connection with criminal charges brought against him by the United States

Government, which case resulted in a jury verdict of not guilty on all counts.

I have been asked to prepare an Affidavit to be presented to the Court in connection with certain defense motions in a similar case involving Dr. Arthur Bieganowski. The request has been made that I affirm the approximate costs of Dr. Valdez defense, in light of the complexity of the Valdez case and in comparison with the issues in the Bieganowski case.

I have some familiarity with the Bieganowski matter since I have been retained by Dr. Bieganowski and his wife to contest the forfeiture of virtually all of his assets and have filed the appropriate claims with the seizing agency. Additionally, Dr. Bieganowski has discussed with me on several occasions the possibility of my representing him in the criminal matter. Because of my familiarity with the lengthy preparation required in Dr. Valdez matter and the much bigger scope of the Bieganowski case I did not feel comfortable in taking Dr. Bieganowski on as a client due principally to his lack of assets to pay the costs of the Defense.

The following is a list of approximate costs, obtained from Dr. Valdez office manager and based in part upon my own recollection:

a.	Jury selection and limited mock trial exercise	$7,500.00
b.	Certified Public Accountant audit and evidence preparation	$150,000.00
c.	Private Investigator	$5,000.00
d.	Computer Analyst	$5,000.00
e.	Attorney's fees (3 lawyers)	$250,000.00
	TOTAL	**$413,500.00**

The Valdez case required many weeks of preparation and took approximately eight days to try. It took the Government approximately four years to prepare for the trial of the case. There were six boxes of letter size documents, approximately two feet in depth, to be examined and organized and a like amount of collated computer printouts relating to the organization of said documents and the information therein contained. It is my understanding from conversations with both former and present counsel for Dr. Bieganowski that the exhibits involved are many, many times the number of those involved in the Valdez matter and I find it logical to believe that the costs of trial preparation, expert witnesses and organization of defense exhibits will greatly exceed that involved in the Valdez case.

/s/ Michael R. Gibson
MICHAEL R. GIBSON
Attorney at Law

SWORN TO AND SUBSCRIBED before me on this the 2nd day of July, A.D., 1999.

[SEAL]

/s/ Barbara Nearing
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS
Commission expires: 12-28-02

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
V.	)	**No. EP98CR0959**
	)	
ARTHUR BIEGANOWSKI, M.D.	)	

DEFENDANT'S BRIEF IN SUPPORT OF EX PARTE MOTION FOR APPOINTMENT OF EXPERT WITNESSES OR TO RELEASE FUNDS TO HIRE EXPERT WITNESSES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW ARTHUR BIEGANOWSKI, M.D., Defendant herein, through counsel (hereinafter "Dr. Bieganowski"), and files this his brief in Support of Ex Parte Motion for Appointment of Expert Witnesses or, in the alternative, to Release Funds to Hire Expert Witnesses. In support of his Ex Parte Motion for Appointment of Expert Witnesses, Dr. Bieganowski would respectfully show:

I. Background and Overview

In September of 1998, Dr. Bieganowski, a United States citizen, was arrested in El Paso, Texas and charged with various offenses related to Medicare fraud. Dr. Bieganowski has been denied bail since the date of his arrest. Trial in this case is currently set for August 23, 1999 in El Paso, Texas.

On January 13, 1999, defense counsel received 130,000 sheets of paper in forty legal- and odd-sized boxes from the government, consisting of materials seized from

Dr. Bieganowski's office. These materials cover ten to fifteen years' worth of financial and medical records. Other than the sixty (60) page indictment in this case, Dr. Bieganowski has received no FBI reports, summarizations or witness statements to indicate which patient files the government is resting its Medicaid fraud allegations against him. No index, or table of contents accompanied the documents. The government tenders no explanation of which documents accompany which counts of the indictment or are even relevant to the prosecution. The government has had these documents for approximately four (4) years.

II. Argument

Without the aid of expert witnesses, defense counsel is unable to meaningfully decipher the documents seized from Dr. Bieganowski's office. Furthermore, due to the sheer volume of documents, defense counsel requires some form of computerized index and labeling system, in order that defense counsel might gain a clear understanding of the Dr. Bieganowski's practice, but also of the evidence which is available to support Dr. Bieganowski's defense. Such indexing is also necessary to gain any meaningful understanding of the charges against Dr. Bieganowski.

All of Dr. Bieganowski's office staff, together with his accountant, who could be of service to counsel in Dr. Bieganowski's absence, have either been indicted as co-defendants or are cooperating with the government. Counsel has never been a part of or associated with Dr. Bieganowski's medical practice before being hired to defend Dr. Bieganowski in the pending criminal case,

therefore defense counsel has no independent understanding of Dr. Bieganowski's practice or the documents necessary to maintain information on each patient.

III. Authorities Supporting Appointment of Expert Witnesses

Title 18 of the United States Code, Section 3006(A) allows an indigent defendant to petition the trial court, *ex parte,* for investigative, expert, or other services necessary for an adequate defense. 18 U.S.C. § 3006(A). Because Dr. Bieganowski's assets have been frozen by the government, Dr. Bieganowski is unable to hire the necessary experts to decipher the codes in the medical documents produced by the government or explain the meaning of the documents to defense counsel.

Courts adjudicating the reach of 18 U.S.C. § 3006A have held that appointment of an expert witness to aid the defendant in the preparation of his defense should not be lightly disregarded. As penned by the Eighth Circuit:

> While the trial court need not authorize an expenditure under subdivision (e) for a mere "fishing expedition," it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge. considering the purpose of § 3006A(e) of the Criminal Justice Act to provide the accused with a fair opportunity to prepare and present his case, the application of the accused's counsel for such services must be evaluated on a standard of reasonableness.

United States v. Schultz, 431 F.2d 907, 911 (8th Cir. 1970). The issue was also thoroughly discussed by Judge

Wisdom in his concurring opinion in ***United States v. Theriault***, 440 F.2d 713, 716 (5th Cir. 1971). In ***Theriault***, which case involved a defense request to authorize employment at government expense of a psychiatrist, the Fifth Circuit reversed the conviction. Although the majority did not discuss the meaning of the statutory phrase "necessary to an adequate defense," Judge Wisdom explored the phrase at length, concluding that the statute required:

> authorization for defense services when the attorney makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses.

Theriault, 440 F.2d at 717.

More recently, in ***United States v. Patterson***, 724 F.2d 1128 (5th Cir. 1984), the Fifth Circuit reversed a conviction on the grounds that the indigent defendant should have been appointed a fingerprint expert in order to prepare for cross-examination of the government's expert. 724 F.2d at 1131.

The Ninth Circuit, quoting Judge Wisdom's concurring opinion in ***Theriault*** with approval, phrased the applicable standard as follows:

> The statute requires the district judge to authorize defense services when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them.

United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1975).

The Second Circuit had a similar view of the scope of 18 U.S.C. § 3006A. In ***United States v. Durant***, 545 F.2d 823 (2nd Cir. 1976), Judge Feinberg, writing for the Court, held:

> We believe that these statements [found in ***Schultz, Theriault***, and ***Bass***] of the applicable test are all essentially similar, and reflect a common concern for fairness at the trial of a criminal offense. We recognize, as did the Fifth and Eighth Circuits, that it is difficult to spell out a rigid rule in great detail. Yet, the purpose of the act, confirmed by its legislative history, is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant. Therefore, the phrase "necessary to an adequate defense" must be construed with this commendable purpose in mind. "Necessary" should at least mean "reasonably necessary," and "an adequate defense" must include preparation for cross-examination of a government expert as well as presentation of an expert defense witness. This does not mean that applications for expert assistance should be granted automatically, or that frivolous applications should be granted at all. But it does mean that the Act must not be emasculated by niggardly or inappropriate construction.

Durant, 545 F.2d at 827. The Fifth Circuit cited ***Durant*** with approval in ***Patterson***.

In the case at bar, the government will be using expert witnesses to decode and translate for the jury some or all of the 130,000 documents which they are relying upon to prove that Dr. Bieganowsk allegedly committed fraud. In order for defense counsel to even prepare for

cross-examination of the government's experts, an expert witness must be hired to decipher and translate all of the 130,000 government documents. Without the aid of an expert, defense counsel cannot meet his "overarching duty to advocate the defendant's cause. . . ." ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

Neither can the trial of Dr. Bieganowski meet the Supreme Court's definition of a fair trial ("one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding") without the aid of expert witnesses to translate and organize, into meaningful groupings, the 130,000 pages of discovery produced by the government. ***Strickland***, 466 U.S. at 685; 104 S. Ct. at 2063.

Refusal to grant Dr. Bieganowski's *ex parte* request for appointment of expert witnesses impedes his access to the court. The right of access to the courts has been defined by the Fifth Circuit as:

> encompass[ing] all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.

Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975). [*citing:* ***Gilmore v. Lynch***, 319 F.Supp. 105, 110 (N.D.Cal. 1970), *aff'd sub nom.* ***Younger v. Gilmore***, 404 U.S. 15, 92 S. Ct. 250, 30 L.Ed.2d 142 (1971)].

Specifically, Dr. Bieganowski requests appointment of:

IV. Alternative Argument: Government's Release of Assets

In the alternative, Dr. Bieganowski would respectfully request that this Court order the government to release sufficient assets to hire the necessary experts to aid Dr. Bieganowski's defense. At the time of Dr. Bieganowski's arrest, the government froze all of Dr. Bieganowski's assets, both real property and liquid assets. The Court has never held a hearing which would allow Dr. Bieganowski to contest the propriety of the government's action.

The Fifth Amendment provides that a person may not be deprived of life, liberty, or property without the due process of law. Consistent with that fundamental guarantee, due process traditionally requires that a defendant not be deprived of his property without adequate notice and opportunity for a hearing. ***Fuentes v. Shevin***, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972). The precise procedural protections due a defendant are flexible and depend on the particular circumstances and interests involved. Thus, in determining what process must be afforded Dr. Bieganowski, this Court must consider (1) the private interest that will be affected by the government's action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any of additional procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional substitute requirement would entail. ***Matthews v. Eldridge***, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976); ***Wofford v. Wainright*** 748 F.2d 1505, 1507 (11th Cir. 1984).

It is beyond cavil that the interest affected here is substantial and compelling. At stake is Dr. Bieganowski's Sixth Amendment right to effective assistance of counsel. The undeniable reality is that "the quality of a criminal defendant's representation may frequently turn on his ability to retain the best counsel money can buy." ***Morris v. Slappy***, 461 U.S. 1, 23, 103 S. Ct. 1610, 1622, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring in result). In this case, Dr. Bieganowski is deprived of effective assistance of counsel because defense counsel is unable to understand or absorb the highly technical and voluminous amount of information turned over by the government without the aid of experts in the fields of accounting and Medicare coding.

In addition to the nature of the interest affected, this Court must consider the probable risk of erroneous deprivation of this interest through the procedures used. In ***United States v. Moya-Gomez***, 860 F.2d 706 (7th Cir. 1988), the Seventh Circuit held that due process was violated by use of a criminal forfeiture statute which denied the defendant any opportunity to contest the government's pre-trial restraint of his assets, thus depriving the defendant of assets needed to retain his counsel of choice. *Accord*: ***United States v. Harvey***, 814 F.2d 905, 928 (4th Cir. 1987), *rev'd in part sub nom.* ***In re Caplin & Drysdale***, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd*, ***Caplin & Drysdale, Chartered v. United States***, 491 U.S. 617, 109 S. Ct. 2646, 105 L.Ed.2d 528 (1989); ***United States v. Unit No. 7 and Unit No. 8***, 890 F.2d 82, 85-86 (8th Cir. 1989) (Arnold, Circuit Judge, dissenting); ***United States v. Crozier***, 777 F.2d 1376 (9th Cir. 1985); ***United States v. Thier***, 801 F.2d 1463 (5th Cir. 1986).

As the court in ***Moya-Gomez*** noted, the risk of an erroneous deprivation is especially pronounced where attorneys' fees are at issue. In most cases the freeze imposed on a defendant's assets may be regarded as temporary since the defendant's use of the assets is merely postponed pending the outcome of the trial. With regard to attorneys' fees however, the freeze constitutes a permanent deprivation since "[t]he defendant needs the attorney now if the attorney is to do him any good." 860 F.2d at 726. The risk is no different when the fee in question compromises the attorney's ability to adequately prepare the defense.

In this case, even if the government's allegations are true, which Dr. Bieganowski denies, then a portion of the fees earned by Dr. Bieganowski were legitimate. In other words, even if Dr. Bieganowski did overcharge the government for some procedures (which he did not), then a portion of the proceeds was lawfully earned. Added together, those lawful increments amount to a substantial portion of Dr. Bieganowski's assets, which should be returned to Dr. Bieganowski. Dr. Bieganowski has never been afforded an opportunity to contest the government's charges with regard to his assets.

For these reasons, Dr. Bieganowski requests a probable cause hearing with regard to the government's hold upon his assets.

This Motion is made not for the purposes of delay, but indeed, to aid and thereby streamline trial preparation in this unusual, document-intensive case. With the help of technical experts, Dr. Bieganowski will be able to produce a cogent, organized defense which will greatly curb the time necessary to try this case. Indeed, if defense counsel

is afforded the necessary aid to understand the documents to be used against Dr. Bieganowski, then cross-examination will proceed toward an identified goal, instead of a meager and length "fishing expedition" to better understand what the documents mean and why the government relies upon them as a basis for its case. Therefore, this Motion is made so that justice may prevail and judicial economy may be advanced.

WHEREFORE, PREMISES CONSIDERED, Dr. Bieganowski respectfully requests an Order granting his *ex parte* Motion for Appointment of Experts. In the alternative, Dr. Bieganowski requests a probable cause hearing as to the legitimacy of the government's freeze upon his assets.

Respectfully submitted,

/s/ H. David Smith
H. DAVID SMITH
State Bar No. 18722000
Attorney for Defendant
1006 Magoffin
El Paso, Texas 79901
(915) 533-5551
(915) 545-2485 (Fax)

CERTIFICATE OF SERVICE

I certify that the foregoing document was hand-delivered to Ms. Debra Kanof, Assistant U.S. Attorney, El Paso County Courthouse, 700 E. San Antonio, Rm. 353, El Paso, Texas 79901 on this the 2nd day of July, 1999.

/s/ H. David Smith
H. DAVID SMITH

APPENDIX "L"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	§	
	§	**NO.**
v.	§	**EP-98-CR-0959**
ARTHUR BIEGANOWSKI, M.D.	§	

AFFIDAVIT

State of Texas)
)
County of El Paso)

BEFORE ME the undersigned authority, on this the 7th day of July, A.D., 1999, appeared Sandra Bieganowski, who after being by me duly sworn, deposed and stated the following:

"I am the wife of Arthur Bieganowski, the Defendant in this cause. I am preparing this affidavit to notify THIS HONORABLE COURT that there are no funds or assets available for my husband [sic] defense.

I personally have no funds or assets to assists [sic] in my husband [sic] defense. Additionally, I have spoken with my husband's parents and other family members and they have stated that they have no funds or assets available to assist in the Defense.

All funds and assets that might be used for the costs of defense have been seized or liened [sic] by the Government.

/s/ Sandra Bieganowski
Sandra Bieganowski

SWORN TO AND SUBSCRIBED before me on this the 7th day of July, A.D., 1999.

[SEAL]	RUBY A. SOTO MY COMMISSION EXPIRES May 18, 2001	/s/ Ruby Soto NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

APPENDIX "M"

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	*	
	*	
v.	*	**No. EP-99-CR-959-DB**
ARTHUR BIEGANOWSKI	*	

NOTICE OF EXPERTS AS ORDERED BY THE DISTRICT COURT

(Filed Mar. 3, 2000)

COMES NOW ARTHUR BIEGANOWSKI M.D., Defendant in the above styled an numbered cause, by and through his Attorney of Record CHARLES LOUIS ROBERTS, and hereby gives notice of the experts who have been retained to testify for the defense at trial.

I.

At the present date, March 3, 2000, the Defense has not retained any expert to testify at trial because the Defense lacks the funds which could be legally expenses for hiring experts.

II.

The Defendant retains the right to utilize any expert witnesses or fact witnesses hired by the Government and/or subpoenaed by the Government to rebut portions of the Government's case. In sum, these witnesses would be

asked to rebut witnesses and/or facts testified to or opinions of witnesses which support the Government's case at trial and which support the financial, coding, and medical practices of Dr. Arthur Bieganowski's medical office. Included in this list would be the medical doctors and other medical personnel who were associated with the Dr. Arthur Bieganowski medical office and which are alleged in the indictment and/or the affidavit to the search warrant affidavit. Finally, the Defendant reserves the right to utilize any CO-Defendant who may testify as to the same issues expressed and summarized above.

III.

The Defense reserves the right to retain experts at a later stage should funds become available. Notice will be given within 36 hours of retaining any expert.

Respectfully submitted,

/s/ Charles L. Roberts
CHARLES LOUIS ROBERTS
Attorney for Defendant
State Bar No. 17000100
215 N. Stanton, Suite 611
El Paso, Texas 79901
(915) 532-5475
(915) 534-7414 Fax

CERTIFICATE OF SERVICE

The undersigned Attorney certifies that he has a receipt for certificate mail number P 320 735 311 and has also hand delivered a copy of the foregoing document to the office of DEBRA KANOF, Supervisory Assistant U. S.

Attorney, 700 E. San Antonio, Suite 200, El Paso, Texas 79901, on the 3rd day of March, 2000.

/s/ Charles L. Roberts
CHARLES LOUIS ROBERTS

APPENDIX "N"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA *
*
v. * **EP-98-CR-959-DB**
*
ARTHUR BIEGANOWSKI, *et al.* *

ORDER

(Filed Mar. 7, 2000)

On this day, the Court considered Defendant Arthur Bieganowski's pleading styled, "Motion for Authorization to Receive and Expend Funds for Defense [or in the Alternative] Motion for Court Appointed Expert," filed on March 3, 2000, in the above-captioned cause. On March 6, 2000, the Government filed its Response to Defendant's Motion. With respect to the procedural background in this case, it suffices for purposes of the instant Order only to note that Defendant currently is in custody and this cause is set for trial on March 13, 2000. Through his Motion, Defendant asks the Court to authorize the release of certain funds to be expended by Defendant to retain "experts and other professionals" to assist Defendant in his defense. Alternatively, Defendant ask [sic] the Court to appoint expert witnesses to assist Defendant is his defense. After due consideration, the Court ~~is of the~~ opinion the following Orders should enter:

IT IS HEREBY ORDERED that Defendant Arthur Bieganowski's pleading styled, "Motion for Authorization to Receive and Expend Funds for Defense [or in the Alternative] Motion for Court Appointed Expert" is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Arthur Bieganowski's counsel, Charles Louis Roberts, is authorized to receive and expend exclusively for the retention of experts and other professionals to assist Defendant Arthur Bieganowski in his defense, the following funds which are to be deposited into the client trust account of Charles Louis Roberts:

1) $25,000.00 in unpaid medical expenses from settlements in the possession of the firm of Victor Bieganowski; and

2) a check from John Hancock Insurance in the amount of $17,009.32, representing the cash value of the life insurance policy of Defendant Arthur Bieganowski.

IT IS FINALLY ORDERED that within ten days of the conclusion of the trial in this cause, Charles Louis Roberts provide to the Court a written accounting detailing the expenditure of the aforementioned funds.

SIGNED this **7th** day of **March, 2000**.

/s/ David Briones
THE HONORABLE
DAVID BRIONES
UNITED STATES
DISTRICT JUDGE

APPENDIX "O"

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	*	
v.	*	**NO. EP-99-CR-959-DB**
ARTHUR BIEGANOWSKI	*	

MOTION FOR CONTINUANCE OF JURY TRIAL

(Filed Mar. 10, 2000)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ARTHUR BIEGANOWSKI, Defendant, by and through his attorney of record, CHARLES LOUIS ROBERTS, and moves for a continuance in this case for thirty (30) days, and for grounds would show this Court the following:

I.

Late afternoon on March 9, 2000, the office of CHARLES LOUIS ROBERTS discovered in the U.S. mail an *ORDER* of this Court authorizing the receipt and expenditure of approximately $42,000.00 for expert and other professional fees. See Exhibit A: *ORDER*; see Exhibit B: *AFFIDAVIT* of Marie Sandoval. The Defense had previously made a *Motion for Appointment of Experts or Release of Funds to Hire Experts*, on July 2, 1999, but such Motion had been denied shortly thereafter.

II.

Contact was made shortly after 8:00 a.m. on March 10, 2000, with Ms. Linda Howard expert on CPT and Workman's Compensation billing and coding, see Exhibit: C *NOTICE OF EXPET* [sic], at her first available appointment at 1:00 p.m. March 10, 2000, Ms. Linda Howard was hired by the Defense team to prepare for and testify at trial. Given the fact that the Government has designated four witnesses as to the coding issue alone, and because coding is a central issue of the case if not the central issue in this case the Defense asserts that the assistance of such a [sic] expert witness or witnesses would be critical and that the lack of such a [sic] expert witness would materially prejudice the defense. Release of the funds mentioned above is greatly appreciated; However, the actual utilization of such an expert would require at least six weeks, see Exhibit D: *AFFIDAVIT OF EXPERT LINDA HOWARD*. Specifically, Ms. Howard states:

> To Whom It May Concern:
>
> With reference to a time that estimated [sic] 400+ boxes of Dr. Arthur Bieganowski records from 1988-1998 in my estimation I feel at the present it would take me approximately 2 months to complete a detailed analysis of the specific cases cited and do an overall review of miscellaneous records that I feel might need to be reviewed as well.
>
> Presently I work for another physician on Mondays and Tuesdays therefore at present I am only available 2-2½ days a week, which would equate to 1 month full work schedule initially. I will need full time assistance from Dr.

Bieganowski's attorneys for approximately 2 weeks allowing myself 30 days alone.

Due to the sized structure of such a project my fee is billed at $200.00 an hour for an estimated 320 hours. I will not be able to testify or work on the case form [sic] May 18 to June 6 because I will be attempting a yearly course offered by the academy where I am certified for the required C.E.U's (continuing education credits) to continue my certification.

I feel that based upon what I have seen today, (1/10/00), at Dr. Bieganowski's attorney's office, I would not be of much assistance if additional time is not given to me to review the documents when I previously,. [sic] consulted at his practice, I was not looking or working on past documents or an audit. I only analyzed certain job-functions presently and if any need to be corrected in my opinion.

AFFIDAVIT OF LINDA HOWARD

WHEREFOREM [sic] THE ABOVE PREMISIS [sic] CONSIDERED. The Defendant prays for a continuance of at least six (6) weeks.

Respectfully submitted

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS
Attorney for Defendant
State Bar No. 17000100
215 N. Stanton, Suite 611
El Paso, Texas 79901
(915) 532-5475
(915) 534-7417 fax

CERTIFICATE OF SERVICE

The undersigned Attorney certifies that he has a receipt for certificate mail number *P 320-735-312* and has also hand delivered a copy of the foregoing document to the office of DEBRA KANOF, Supervisory Assistant U.S. Attorney, 700 E. San Antonio, Suite 200, El Paso, Texas 79901, on the 10th day of March, 2000.

/s/ **Charles Louis Roberts**
CHARLES LOUIS ROBERTS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA *
*
v. * **EP-99-CR-959-DB**
*
ARTHUR BIEGANOWSKI, *et al.* *

ORDER

(Filed Mar. 7, 2000)

On this day, the Court considered Defendant Arthur Bieganowski's pleading styled, "Motion for Authorization to Receive and Expend Funds for Defense [or in the Alternative] Motion for Court Appointed Expert," filed on March 3, 2000, in the above-captioned cause. On March 6, 2000, the Government filed its Response to Defendant's Motion. With respect to the procedural background in this case, it suffices for purposes of the instant Order only to note that Defendant currently is in custody and this cause is set for trial on March 13, 2000. Through his Motion, Defendant asks the Court to authorize the release of certain funds to be expended by Defendant to retain "experts and other professionals" to assist Defendant in his defense. Alternatively, Defendant ask [sic] the Court to appoint expert witnesses to assist Defendant is his defense. After due consideration, the Court is of the opinion the following Orders should enter:

IT IS HEREBY ORDERED that Defendant Arthur Bieganowski's pleading styled, "Motion for Authorization to Receive and Expend Funds for Defense [or in the Alternative] Motion for Court Appointed Expert" is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Arthur Bieganowski's counsel, Charles Louis Roberts, is authorized to receive and expend exclusively for the retention of experts and other professionals to assist Defendant Arthur Bieganowski in his defense, the following funds which are to be deposited into the client trust account of Charles Louis Roberts:

1) $25,000.00 in unpaid medical expenses from settlements in the possession of the firm of Victor Bieganowski; and

2) a check from John Hancock Insurance in the amount of $17,009.32, representing the cash value of the life insurance policy of Defendant Arthur Bieganowski.

IT IS FINALLY ORDERED that within ten days of the conclusion of the trial in this cause, Charles Louis Roberts provide to the Court a written accounting detailing the expenditure of the aforementioned funds.

SIGNED this **7th** day of **March, 2000**.

/s/ David Briones
THE HONORABLE
DAVID BRIONES
UNITED STATES
DISTRICT JUDGE

AFFIDAVIT OF MARIE A. SANDOVAL

COUNTY OF EL PASO)
)
STATE OF TEXAS)

BEFORE ME, THE UNDERSIGNED AUTHORITY, personally appeared, **Marie A. Sandoval**, who, known to me to be Marie A. Sandoval, and being by me duly sworn, upon his oath, stated as follows:

My name is Marie A Sandoval. I am over the age of eighteen (18), I have never been convicted of a felony, I am of sound mind and in all other respects I am qualified to make this affidavit. The facts stated herein to the best of my knowledge are true and correct.

On Thursday, March 9, 2000, the mailman delivered the mail approximately between 12:00 p.m. and 1:00 p.m. and left it on the front table which is where he usually leaves it. I picked it up and put it on my desk at about 3:00 p.m. and opened the mail around 3:30 p.m. or 4:00 p.m. We received in the mail this day, an Order from the Federal Court on the Motion for Authorization to Receive and Expend Funds for Defense [or in the Alternative] Motion for Court Appointed Expert.

Further Affiant sayeth naught.

/s/ Marie A. Sandoval
MARIA A. SANDOVAL
affiant

SUBSCRIBED TO AND SWORN BEFORE ME on this 10th day of March, 2000, to certify which witness my hand and seal of office.

/s/ Monica Buschardt
Notary Public In and For
the STATE OF TEXAS

My Commission expires:
Aug. 4, 2002

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	*	
	*	**NO. EP-98-CR-959-DB**
VS.	*	
	*	
ARTHUR BIEGANOWSKI	*	

NOTICE OF EXPERT WITNESS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ARTHUR BIEGANOWSKI, Defendant in the above-entitled and numbered cause and would show the Court the following grounds in support of the motion:

I.

At approximately 1:00 p.m., March 10, 2000, Ms. Howard was hired by Defense Counsel as an Expert Witness.

II.

GENERAL QUALIFICATIONS

Linda Desiree Howard
1554 Bangal Dr.
El Paso, Texas 79935
(915) 592-7128

Mrs. Howard, President and Owner of CPC Medical Billing and Consulting Service, is a member of the (AAPC)

American Academy of Professional Coders since 1992. She has been in the health care field serving multispec [sic] clinics and physicians. Since 1975, her expertise is in the area of reimbursement fiscal management and health policies as it relates to various medical services and physical medicine. She has served as a consultant to several physician offices and clinics to include radiology, physical medicine, family medicine, internal medicine, optometry, surgery, and other medical fields.

III.

SUMMARY OF EXPECTED TESTIMONY

Ms. Howard will testify as the standard, laws, and rules of the State of Texas as well as the standards laws, and rules of the American Medical Association as they apply to medical care generally and to the medical practice of Dr. Bieganowski in particular. Ms. Howard will examine and explain changes made in Dr. Bieganowski's medical practice through her intervention. Ms. Howard will also discuss the extent of Medical Care, Physical Therapy, Acupuncture, and other services provided by the Dr. Bieganowski Medical Office. Ms. Howard my [sic] also testify regarding the activities of various Dr. Bieganowski's [sic] employees which she observed. She will be asked to listen to the testimony of government expert witnesses on coding, to advice defense counselor as to cross-examination, and to testify in rebuttal to opinions and/or facts and/or coding regulations presented by government expert witnesses on coding.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, the Defendant prays that this Court grant this motion.

Respectfully submitted,

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS
State Bar No. 17000100
Attorney For Defendant
The Martin Building
215 N. Stanton, Suite 611
El Paso, Texas 79901
(915) 532-5475
(915) 534-7417 FAX

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the foregoing document was served upon the Office of the U.S. Attorney, 700 E. San Antonio, Room 353, El Paso, Texas 79901, on this the 30th day of June, 1998.

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS

AFFIDAVIT OF LINDA DESIREE HOWARD

COUNTY OF EL PASO)
)
STATE OF TEXAS)

BEFORE ME, THE UNDERSIGNED AUTHORITY, personally appeared, **Linda Desiree Howard**, who known to me to be Linda Desiree Howard, and by me duly sworn, upon his oath, stated as follows:

My name is Linda Desiree Howard. I am over the age of eighteen (18), I have never been convicted of a felony, I am of sound mind and in all other respects I am qualified to make this affidavit. The facts stated herein to the best of my knowledge are true and correct.

With reference to a time that it would take me to review the estimated 400+ boxes with Dr. Arthur Bieganowski records from 1988-1998 [sic]. In my estimation I feel at the present it would take me approx. 2 months to complete or detail analysis [sic] of the specific cases cited and do an overall review if misc. records that I feel might need to be reviewed as well.

Presently, I work for another physician on Mondays and Tuesdays, full-time, and half a day, Thursday. Therefore, at present, I am only available 2-2½ days a week, which would equate to 1 month full workschedule. Initially, I will need full time assistance from Dr. Bieganowski's attorneys for approx. 2-2½ weeks and then again upon completion for 2 weeks allowing myself 30 days alone.

Due to the sized structure [sic] with such a project my fee is billed and $200.00/hr. for an estimated 320 hrs.

I will not be able to testify or work on the case from May 18-June 6 because I will be attending a yearly course offered by the academy where I am certified for the required C.E.U.'s (continuing education credits) to continue my certification.

I feel that based upon what I have seen today, (1-10-00), at Dr. Bieganowski's attorney's office, I would not be of much assistance if additional time is not given to me to review the documents because when I previously, consulted at his practice, I was not looking or working on past documents or an audit. I only analyzed certain job-functions presently being performed and if any needed to be corrected in my opinion.

Further Affiant sayeth naught.

/s/ Linda Desiree Howard
LINDA DESIREE HOWARD
affiant

SUBSCRIBED TO AND SWORN BEFORE ME on this 10th day of March, 2000, to certify which witness my hand and seal of office.

My Commission expires:
Aug. 4, 2002

[SEAL] MONICA BUSCHARDT
MY COMMISSION EXPIRES
AUGUST 4, 2002

/s/ Monica Buschardt
Notary Public In and For the
STATE OF TEXAS

APPENDIX "P"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	*	
	*	
V.	*	**No. EP98CF0959**
ARTHUR BIEGANOWSKI, M.D.	*	

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR CONTINUANCE

(Filed Mar. 10, 2000)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW ARTHUR BIEGANOWSKI, M.D., Defendant herein, through counsel (hereinafter "Dr. Bieganowski"), and files this his Brief in Support of Motion for Continuance. In support of his Motion for Continuance, Dr. Bieganowski would respectfully show:

I. Background and Overview

Dr. Bieganowski is charged with various offenses related to Medicare fraud, which allegedly began as early as 1986. Discovery, consisting of approximately 600 boxes of documents, consists largely of materials seized from Dr. Bieganowski's office. (Each box is the size of a case of paper, capable of holding ten 500-sheet reams.) These materials cover ten to fifteen years' worth of financial and medical records. No index, table of contents, or other organizational or identification device accompanied the documents. The government tendered no explanation of which documents relate to which of the twenty-three

counts of the indictment or are even relevant to the prosecution.

At the outset of Dr. Bieganowski's prosecution, the government moved to freeze all of his assets save for a fixed amount accorded to the attorneys for their fee and for the financial maintenance of Dr. Bieganowski's family. The government has maintained throughout that all other funds are related to the alleged crimes.

Defense counsel has never been a part of or associated with Dr. Bieganowski's medical practice before being hired to defend Dr. Bieganowski in the pending criminal case. Therefore defense counsel has no independent understanding of Dr. Bieganowski's practice or the documents necessary to maintain information on each patient or bill the appropriate agencies for each procedure.

Because of the highly technical nature of the documents used to bill a medical procedure to the proper insurance or Medicaid authority, Dr. Bieganowski has repeatedly requested the release of funds in order to hire an expert witness. This Court denied the motions. Dr. Bieganowski then requested appointment of an expert witness in order to prepare his defense against the government's allegations. This request was also denied. Because Dr. Bieganowski was left without the funds to hire an expert witness, he has been unable to consult with an expert witness, despite defense counsel's otherwise diligent trial preparation.

On the Monday prior to trial, this court released an amount of money from Dr. Bieganowski's funds for use in hiring an expert witness. Due to the complexity of the case, the number of documents produced in discovery by the government, and the highly technical nature of the

documents and the charges, Dr. Bieganowski requests enough time to allow his expert witness to review the documents and the charges and be prepared to testify at trial and to rebut the testimony of the government's expert witnesses.

II. Argument

Given the complexity of the government's allegations, and enormity of the technical documents used by the government to support its case, which documents are also necessary to prove Dr. Bieganowski's innocence, it is impossible for an expert witness to sift through the allegations review the documents and familiarize him or herself with the facts in the six days this Court has allotted. Because this Court denied all previous attempts by Dr. Bieganowski to access funds for an expert or to have an expert appointed by the Court, Dr. Bieganowski and counsel have necessarily prepared for trial in the only way possible, without any aid by an expert. Indeed, Dr. Bieganowski was not even able to consult with an expert as no funds were made available by the Court for a consulting fee.

Furthermore, Dr. Bieganowski has not been able to turn to his former office staff or other advisors, as all of those persons with relevant knowledge of the Medicaid and other technical coding procedures have also been indicted in this case.

With funds now available, Dr. Bieganowski may, for the first time, hire the expert necessary to properly defend himself against the government's allegations. However, no expert can go through the approximately 600 boxes of documents, together with the government's allegations, in

six days' time, even if an expert could be found that could immediately devote his or her entire attention upon this case. Indeed, denying Dr. Bieganowski's request for a continuance in order to hire an expert with funds newly released, and for that expert to prepare for trial, would be so arbitrary as to result in a violation of Dr. Bieganowski's right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

Although the matter of a continuance is traditionally within the discretion of the trial judge, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." ***Ungar v. Sarafite***, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L.Ed.2d 921 (1964); ***Hicks v. Wainwright***, 633 F.2d 1146, 1149 (5th Cir. 1981). The request for time for an expert to prepare for a defense against highly technical and complex charges is certainly a justifiable request. ***Hicks v. Wainwright***, *supra*; ***United States v. Fessell***, 531 F.2d 1275 (5th Cir. 1976).

In ***Hicks***, a habeas corpus case, the defendant was denied his sole witness, a psychiatrist who could testify regarding the defendant's sanity at the time the offense was committed. 633 F.2d at 1147-48. The Fifth Circuit Court of Appeals affirmed the Federal District Court's grant of habeas corpus, holding:

> Dr. Rothenberg's testimony was critical. It was, as the district court found, the "only testimony potentially effective to his defense." ***United States v. Fessell***, 531 F.2d 1275, 1280 (5th Cir. 1976). Denying petitioner's motion for a continuance for a few hours effectively stripped him of any defense he might have had.

Hicks, 633 F.2d at 1150.

Similarly, in ***Fessell***, *supra,* the defendant moved, at the commencement of trial, to have defense counsel relieved and for appointment of new counsel. 531 F.2d at 1280. The defendant then moved for a continuance, arguing that his counsel's preparation was inadequate for the reason that counsel failed to procure records from the defendant's prior mental institutionalizations showing the defendant was schizophrenic. *Id.* This motion was likewise denied. *Id.*

The Fifth Circuit reversed the defendant's conviction, finding:

> The result of this refusal to grant a continuance was to deprive the accused of the only testimony potentially effective to his defense. Through the favorable testimony of a psychiatrist appointed under sec. 3006A(e) to assist in his defense, or through the records of a private psychiatrist familiar with the appellant's condition shortly before his arrest, or through the live testimony of government staff psychiatrists who had examined him shortly after his arrest, Fessell was entitled to present expert medical evidence to support his insanity defense. The record shows that he expressly requested the trial judge to allow him to make this defense. His attorney's failure adequately to prepare the defense could not constitute grounds for disqualifying Fessell from doing so, even at the price of some delay.

Fessell, 531 F.2d at 1280.

Dr. Bieganowski presents a similar set of circumstances. Dr. Bieganowski has requested, through counsel, that this court either appoint an expert to challenge the

government's allegations or to release funds for the purposes of hiring such an expert. Every request has been flatly refused by this Court. Dr. Bieganowski was left without even the funds necessary to consult with an expert witness in preparation for trial.

Finally, six days before trial, funds necessary for hiring an expert witness became available. However, as shown above, the amount of time left between this Court's Order and the date of trial cannot begin to afford an expert witness the time necessary to acquaint him or herself with the complexity of the allegations or the multiplicity of documents in the case.

The government intends to call expert witnesses to decode and translate for the jury some or all of the 600 boxes of documents relied upon to prove that Dr. Bieganowski allegedly committed fraud. In order for defense counsel to even prepare for cross-examination of the government's experts, an expert witness is needed to decipher and translate all of the 600 boxes of government documents. Without the aid of an expert, defense counsel cannot meet his "overarching duty to advocate the defendant's cause. . . ." ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

Neither can Dr. Bieganowski prove to a jury his innocence without an expert witness to decode and explain the documents to the jury and explain the procedures and lawful methods used by Dr. bieganowski in his practice.

Refusal to grant Dr. Bieganowski's Motion for Continuance in order to hire an expert witness and allow that witness time to prepare impedes Dr. Bieganowski's access to the court. The right of access to the courts has been defined by the Fifth Circuit as:

> encompass[ing] all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.

Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975). [*citing:* ***Gilmore v. Lynch***, 319 F.Supp. 105, 110 (N.D.Cal. 1970), *aff'd sub nom.* ***Younger v. Gilmore***, 404 U.S. 15, 92 S. Ct. 250, 30 L.Ed.2d 142 (1971)].

Finally, the Fifth Amendment provides that a person may not be deprived of life, liberty, or property without the due process of law. If this Court fails to allow an expert witness the time necessary to prepare for Dr. Bieganowski's trial, then Dr. Bieganowski will be deprived of both liberty and property without due process of law.

This Motion is made not for the purposes of delay, but indeed, to aid and thereby streamline the trial in this unusual, document-intensive case. With the help of a technical expert Dr. Bieganowski will be able to produce a cogent, organized defense which will greatly curb the time necessary to try this case. Indeed, if defense counsel is afforded the necessary aid to understand the documents to be used against Dr. Bieganowski, then cross-examination will proceed toward an identified goal, instead of a meager and lengthy "fishing expedition" to better understand what the documents mean and why the government relies upon them as a basis for its case. Therefore, this Motion is made so that justice may prevail and judicial economy may be advanced.

WHEREFORE, PREMISES CONSIDERED, Dr. Bieganowski respectfully requests an Order granting his Motion for Continuance.

Respectfully submitted,

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS
State Bar No. 17000100
Attorney for Defendant
215 N. Stanton, Suite 611
El Paso, Texas 79901
(915) 532-5475
(915) 534-7417 (Fax)

CERTIFICATE OF SERVICE

I certify that the foregoing document was hand-delivered to Ms. Debra Kanof, Assistant U.S. Attorney, El Paso County Courthouse, 700 E. San Antonio, Rm. 353, El Paso, Texas 79901 on this the 10 day of Mar., 2000.

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS

APPENDIX "Q"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	EP-98-CR-959-DB
vs.	
ARTHUR C. BIEGANOWSKI (1)	El Paso, Texas
RICHARD J. GOLDBERG (3)	
GUSTAVO DIAZ (6)	
JESSE JAIME LOPEZ (7)	April 13, 2000

VOLUME 28 of 43 VOLUMES
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[28-12] the patients were treated in Dr. Bieganowski's practice.

In think the Government's case will be founded on various things, one of which is statistics. I think that aside from what's already been established, we're going to be able to show you that some of those statistics were based on false assumptions. In some cases, they are just absolutely wrong. And basically, as Dr. Osborne testified, I think we're going to be able to show they were just statistics. They can be manipulated one way or another way, to just show about anything.

But in any case, we will also show the Government's case, and we've also heard this from the witnesses, and we will present more evidence that the Government kind of,

in this case, has operated as a schoolyard bully, in a way. They threatened witnesses with prosecution. You either cooperate with us and join the team or you're going to be sitting here at this table. And that's basically what's happened.

I also think that the evidence will show that they've accepted almost any allegation against the doctor, whether true or false, and gone with it. We will show you specific examples of that.

One of the specific examples, we would show you [28-13] that George Lozano lied when he said, I did not talk with Linda Howard. I believe Linda Howard will testify and will have actual notes of her conversations with George Howard (sic), who was head of the auto. Why was his lie accepted by the Federal Government? I do not know.

Lucy Campos, exactly the same. She testified, I didn't specifically defend any coding with Linda. I didn't have that kind of specific conversations [sic] with her. I think the notes and the testimony of Linda Howard will be that that actually did occur.

Our case will be simple. The doctor will testify. Dr. B will be sitting on that chair, and he will testify. He has a right not to testify, but he will testify.

The patients will testify. You've already heard some. Some employees will testify. Linda Howard will testify as to what she did and what she observed and what happened during that period of time.

Now, the patients will testify, but – and I cannot go through – because there's such a number of them, I cannot go through all of their testimony. I cannot go through all of

their testimony and say what it all is, because of the limits of the time in addressing you this morning. But I can tell you what

* * *

APPENDIX "R"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)	EP-98-CR-959-DB
vs.	)	
ARTHUR C. BIEGANOWSKI (1) RICHARD J. GOLDBERG (3) GUSTAVO DIAZ (6) JESSE JAIME LOPEZ (7) GUADALUPE RODRIGUEZ MORALES (9)	)	El Paso, Texas
	)	March 14, 2000

VOLUME 10 OF 43 VOLUMES
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[10-52] A. Special Agent Griego had asked was looking for an undercover to join up with another female undercover to pose as a married couple, in the investigation that he was working on regarding Mr. Bieganowski.

Q. Okay. And what was the nature of the undercover? Who were you supposed to pose as?

A. We were going to pose as a married couple who had been involved in a car accident. And we were to seek treatment, or obtain treatment at the – at Mr. Bieganowski's clinic, facility.

Q. And you said, "we," and I'm inferring that there's another person involved in this undercover. Who would that be?

A. That would be Special Agent Luz Garcia.

Q. And she was supposed to pose as your wife?

A. Yes, that's correct.

Q. And her name would have been?

A. Laura Salinas.

Q. And yours was?

A. Richard Diaz.

Q. Now – and was it to concern an accident that allegedly occurred at Viscount – at the 9300 block of Viscount?

A. Yes, sir; that's correct.

Q. And the accident was to have occurred on?

[10-53] A. July 20th.

Q. Okay. 19___

A. ___95.

Q. Okay. Now, as part of the undercover, were you supposed to basically eventually go see some sort of medical personnel?

A. Yes, sir; that's correct.

Q. Did that ever come about?

A. Yes.

Q. And how did that come about?

A. We received a phone call through our undercover telephone at that point, the phone number we had at that time, from a Roberto – Robert Griego, from that facility at 5801 Trowbridge, in El Paso.

Q. And did you speak with Roberto Griego?

A. Initially, no. Over the phone call, no. Eventually, we did meet with him in person.

Q. Okay. And where exactly did you meet with him?

A. We met in his office at the 5801 Trowbridge, in El Paso, Texas.

Q. Okay. And when you get to 5801 Trowbridge, would that have been on July 26th of 19___

A. Yes, sir; that's correct; 1995.

Q. Now, Agent, as part of the undercover capacity, were you and Agent Garcia – were you all wearing a

* * *

[10-94] A. Basically, that we felt no pain, there's nothing that was bothering us.

Q. Now, Agent, when he was touching you –

A. Excuse me?

Q. When he was touching you, when he had his hands on you and doing, for the lack of a better word, examination, was he pressing on anything?

A. Yes. There were certain points in our body that he was doing that to.

Q. And he would ask you if you felt pain?

A. Correct.

Q. And you indicated –

A. No.

Q. Okay. And did he, though, come back and tell you something else?

A. Yes, sir, I believe so.

Q. And what is it that he told you?

A. I believe it concerned our neck and back. I don't know exactly, without – I don't recall the exact words.

Q. Would it assist you, Agent, to refer back to your transcript?

A. Yes, sir, it would.

Q. Would you please refer to page 14?

A. Yes, sir. Okay. I recall now.

[10-95] Q. What did he indicate to you?

A. He said that there was a problem with the neck.

Q. And that – you had already indicated, you said, No pain?

A. Correct.

Q. Now, did he say that he was going to recommend some sort of treatments for you?

A. Yes, sir, that I was going to get some neck x-rays done and some cervical x-rays done, and that there was

also physical therapy available and biofeedback available. He didn't specify as to who was going to get what. I knew I was going to get x-rays.

Q. And did you learn later on – did you have to drive somewhere to go get the biofeedback?

A. No, sir.

Q. Okay. Did you have to drive somewhere to go get the physical therapy?

A. No, sir.

Q. Did you have to drive somewhere to go get the x-rays?

A. No, sir.

Q. Where were all these facilities located?

A. In the building at 5801 Trowbridge.

Q. So it's sort of like one-stop shopping?

A. That's correct.

[10-96] Q. They even had an attorney; is that correct?

A. That's correct.

Q. Now, eventually, do you – do you eventually go talk to a person and get some prescriptions for the treatments he's recommending?

A. Yes, sir.

Q. Okay. And eventually, you do go and see another medical personnel?

A. Yes, sir, we do.

Q. Now, who was that other person that you met?

A. Jesse Lopez.

Q. And when you encountered Jesse Lopez, did you tell him you had injuries?

A. We told him we had no injuries.

Q. Okay. Now, Agent, did you use a specific terminology, that – when you met with him and talked to him? Would it help you to refresh your memory as to what exactly you told him?

A. Yes, it would.

Q. Would you please refer to page 21?

A. Okay.

Q. I would like for you to use the exact words you told him.

A. Okay.

Q. Have your read that, Agent?

[10-97] A. Yes, sir.

Q. Now, can you please tell the jury what questions he asked you and what answer you gave?

A. He asked me, he goes, "What seems to bother you right now, Richard"?

And I told him, Right now, "I'm feeling great, no problems."

And he says, "Nothing at all?"

And –

Q. Okay. Before you go to the next part of the sentence, at that point, did Jesse Lopez tell you, You know what, Mr. Diaz, you're not injured, why don't you go home?

A. No, sir, he didn't.

MS. STILLINGER: Objection, Your Honor, to leading questions.

THE COURT: Overruled.

A. No, sir, he did not.

Q. (BY MR. GARCIA) Okay. Agent, at that point, you have seen Dr. Untersee, a chiropractor?

A. Yes, sir.

Q. You've seen a physical assistant?

A. Yes, sir.

Q. You've seen Dr. Bieganowski?

A. Yes.

[10-98] Q. And you've told all of them that you're not injured; is that correct?

A. That's correct, sir.

Q. And at this point, Lopez does not tell you, Go home, you're not injured?

A. No, sir.

MS. STILLINGER: Objection, asked and answered.

THE COURT: I'll sustain the objection.

Q. (BY MR. GARCIA) Now, what happens right after that? When you said you feel great, what does he tell you?

A. He said that the doctor had indicated it was something in our neck and back.

Q. Before you got to that, did you have another small discussion?

A. No, sir.

Q. Would it assist you to refer to your transcript?

A. Yes, it would.

Q. Would you please refer to page 21?

A. Okay.

Q. After you say the word "Great," what does he ask you?

A. He asked me, "No problems"? As in the form of a question, "No problems"?

And I said, "No, not at all."

[10-99] Q. At that point, did Jesse Lopez tell you, Why don't you go home? You're not injured?

A. No, sir he didn't.

Q. Okay. Now, after that, what did Jesse Lopez tell you?

A. He said the doctor had indicated that we had a problem with our – something in our neck and our mid-back.

And he asked us, Did you tell him that that's what you were feeling?

Q. And at that point, does Jesse Lopez let you answer that question?

A. No, sir.

Q. What does he ask you next?

A. Well, then he asked me, he goes, "Did you have any x-rays done or anything like that?"

Q. So he never – you were never able to answer the question that he asked you?

MS. STILLINGER: Objection, Your Honor. I think he's leading, and he did answer the question.

THE COURT: I'll sustain the objection.

Q. (BY MR. GARCIA) At that point, did Jesse Lopez send you home because you weren't injured?

A. No, sir.

Q. Now, at this point, had you indicated you had any [10-100] point (sic) at all to Jesse Lopez?

A. I'm sorry?

Q. Had you indicated to Jesse Lopez that you had any pain?

A. No, sir.

Q. What question did he ask you now?

A. He says, "Do you have any complaints at the present time?"

And I told him, No.

Q. And just for – would you please refer to your transcript, to use the exact wording he used?

A. Okay. He says, "And you have no major complaints at the present time?"

To which I answered, "No."

Q. And at that point, did he send you home?

A. No, sir.

Q. Okay. Now, what happened next?

A. At that point, he asked us if we wanted to still have physical therapy. He said, "It's up to you."

Q. Okay. At this point you've already told him three times you had no pain, and he asks you if you want physical therapy?

A. That's correct.

Q. And he allows for you to decide if you want physical therapy?

[10-101] MS. STILLINGER: Objection, Your Honor, he's asked and answered this.

THE COURT: I'll sustain the objection.

Q. (BY MR. GARCIA) So at this point, did he send you home?

A. No, sir.

Q. Okay. Now, did you ask him what physical therapy entailed?

A. Yes, sir, I did.

Q. And how did he respond?

A. He said he was going to just check our motion, from the neck all the way down, our range of motion.

Q. And did you ask anything else, or did he elaborate?

A. I don't recall, sir.

Q. Would it help you to refresh your memory, if –

A. Yes.

Q. – you would refer to your transcript?

A. Yes, sir, it would.

Q. Would you please refer to your transcript?

A. Okay.

Q. Can you please tell the jury what it is he told you next?

A. When I asked him what all it entailed, he said that it entailed just checking our motion from the [10-102] neck all the way down.

And he said, "What else?"

He said, "Because you have no problems" – that if they found an area that there was a problem, that that's the area that was going to be focused on.

Q. So still – is he still pushing you to find something?

A. He says that it was still up to me, and – and that was it. He said it was still up to me to decide.

Q. Agent, is it apparent at this time that if you had said, I have pain, you were going to get physical therapy?

MS. STILLINGER: Objection, Your Honor, he's leading.

THE COURT: I'll sustain the objection.

Q. (BY MR. GARCIA) What did you infer from that statement, Agent?

A. Well, that as soon as I told him something was bothering me, that we were going to get the treatment.

Q. So you – it was up to you to decide your therapy; is that correct?

A. That's correct.

MS. STILLINGER: Objection, Your Honor, he's leading the witness.

[10-103] MR. GARCIA: I can rephrase it, Your Honor.

Q. (BY MR. GARCIA) Who was it up to to decide your physical therapy?

A. It was going to be up to me and Agent Garcia, if she had problems, as well.

Q. Oh, that's right. She was present, as well, for this, wasn't she?

A. Yes, correct.

Q. So then at that point, did he tell you to go home?

A. No, sir, he did not.

Q. What did he do?

A. At that point, he examined Agent Garcia, or he asked her questions about her age and whatnot.

Q. And you were present during this questioning?

A. Yes, I was.

Q. And did he ask her if she was having pain?

A. Yes, he did.

Q. And did she indicate that there was no pain?

A. She said, No.

Q. And so then he does his examination; is that correct?

A. Yes, sir.

Q. And how would you, just for the record, characterize that?

A. He had both of us – I believe he – he had us [10-104] twist a couple of directions, and we walked on our heels, and that was pretty much it. I don't recall a whole lot of it.

Q. And did he eventually tell you – after he examined both of you, did he eventually tell you that he wasn't going to give you treatment that day?

A. That's correct.

Q. Okay. And at that point, did you have another discussion with him, though, about Dr. Bieganowski and why was Dr. Bieganowski seeing you?

A. Yes, sir, I believe so.

Q. Would it assist you for me to direct you, Agent, to the page that that information is on?

A. Yes, that would help.

Q. Would you please go to page 30?

A. This was the exam itself.

Q. Okay. And at the very bottom of page 30, the last Lopez statement?

A. Right. He asked us if there was a reason why he wanted to see us next week, referring to the doctor.

Q. And did you infer something from that? I mean, why was he ask asking you that? Had he found any injuries?

A. No.

Q. Now, did you have a discussion with Jesse Lopez [10-105] about when pain would become apparent, if you were involved in an accident?

A. Yes, sir; that's correct.

Q. And Jesse Lopez told you how many days would pass before you should start feeling pain?

A. He said two or three.

Q. How many? Two or three?

A. Two days, I'm sorry.

Q. Okay. Days?

A. Yes, days.

Q. Okay. And you – at this point, Agent, how many days had passed since your accident?

A. Seven.

Q. Okay. So although seven days passed, and Jesse Lopez knows that after two days your pain would already be symptomatic and obvious, he still did an evaluation on you?

A. Yes, he did.

MS. STILLINGER: Objection, Your Honor. He's leading the witness.

THE COURT: I'll sustain the objection.

Q. (BY MR. GARCIA) Agent, how many days had passed since your examin- – since your accident?

A. Approximately seven days.

Q. Okay.

[10-106] A. – from the time that we reported the accident, which was on the 20th.

Q. And how many days had Jesse Lopez told you should pass before you should start feeling your pain?

A. Two to three days.

Q. So is two to three days less than seven?

A. Yes, sir.

Q. Okay. And so Jes- – did Jesse Lopez already know, then, that you should have already had your symptoms and your pain?

MS. STILLINGER: Objection, Your Honor, as to how this witness would know what Jesse Lopez knows.

THE COURT: I'll sustain the objection.

Q. (BY MR. GARCIA) Did you have a conversation with him about going back to Dr. Bieganowski for treatment?

A. Yes, sir.

Q. And what did he tell you?

A. I don't recall.

Q. Would you please refer to page 31?

A. Okay. I remember now.

Q. Okay. What did he tell you?

A. That in terms of the treatment, that it was still – it was – as far as he was concerned, that he was not going to send us for therapy if he didn't think we needed it.

[10-107] Q. But what is the first part of that sentence referring to?

A. That it was up to us.

Q. Up to you guys to determine what?

A. I mean, I took it as it was up to us to determine whether or not we needed physical therapy or not.

Q. So it would be an incorrect characterization to say that Jesse Lopez just told you, No therapy. He was leaving it up to you; is that correct?

A. Exactly, correct.

Q. Okay. Now, when did – when did Jesse Lopez tell you, agent, I'm going to go back to Dr. Bieganowski and discuss my findings, since our findings are inconsistent. When did he tell you that?

A. He didn't, sir.

Q. Despite the fact that he found nothing wrong with you?

A. That's correct.

Q. Now, Agent, did you have the occasion, subsequent to these days, to go back and visit Dr. Bieganowski's facilities?

Excuse me. Before I go on, strike that.

Agent, your time period with – yours and Agent Garcia's time period with physical therapist Lopez and the entire time you're in there, I asked you-all to [10-108] time that. How long did that last?

A. I believe that was 16 minutes, sir, from the time that we met him to the time that he was done with – 16 minutes for both of us combined.

Q. So dividing it, probably – just to be fair – eight each or –

A. Yes.

Q. – or it could be a combination of that, of seven, nine?

A. Possibly, yes, sir.

Q. Okay. And that's also – they can review the transcript and the tapes to determine what exactly he performed?

A. Yes, sir.

Q. When you met with Jesse Lopez, did he indicate to you what Dr. Bieganowski was saying was wrong with you?

A. Yes, sir, he did.

Q. And what did he say that Dr. Bieganowski was saying that was wrong with you?

A. He was saying it was – again, going back to the neck and back.

Q. Okay. But had Dr. Bieganowski told you neck and back?

A. I believe so, sir. I don't recall exactly.

[10-109] Q. Would you like to refresh your memory?

A. Yes, sir.

Q. Please refer to page 14.

A. Yes. We talked about this statement earlier.

Q. And Dr. Bieganowski told you what?

A. He said, "Bottom line, you guys have a problem with your neck, okay?"

Q. And Jesse told you Dr. Bieganowski said what?

A. That we had problems with our neck and back.

Q. Okay. But, those aren't consistent, are they? Dr. Bieganowski said neck?

A. Right.

Q. And Jesse said –

A. Back – neck and back.

Q. Now, Agent, did you eventually go back to Dr. Bieganowski's facilities?

A. Yes, sir. Yes, we did.

Q. Okay. And do you recall those dates?

A. I believe the dates were August 14th and August 21st.

MR. GARCIA: Your Honor, may I approach the witness?

THE COURT: You may.

Q. (BY MR. GARCIA) You indicated that the dates you believe you went back were August the 14th and August [10-110] the 21st; is that correct?

A. Yes, sir; that's correct.

Q. And at those times, can you please describe – I believe the examinations, for the lack of a better word, were similar. Can you please describe to the Court and to the jury what it is – your encounter with Dr. Bieganowski, what it consisted of and how long you stayed with him?

A. We didn't actually time these visits. In reviewing the transcripts, they – I had trouble remembering them, because they – they were quick – quick visits.

Q. But you did have the occasion to listen to the transcripts and to refresh your memory; is that correct?

A. Yes, sir; that's correct.

Q. How long would you say that it was, approximately?

A. Timewise, it would be hard to say. But they were very short. Very short.

Q. Less than 10 minutes, less than five?

A. Oh, yes. Yes, definitely.

Q. And that's, again, for both of you?

A. That's correct.

Q. Okay. Now, if a medical record reflected that you received a process called "cupping," on August the [10-111] 21st, would that be a correct statement? Did you receive a therapy called – did you have any treatment from Dr. Bieganowski when you were there?

A. No, sir, not at all.

Q. Okay. Agent –

MR. GARCIA: May I approach, Your Honor?

THE COURT: You may.

Q. (BY MR. GARCIA) Agent, I'm handing you a thing that's called – it's marked Government's Exhibit Number 27. Can you tell me what that is?

A. It looks like a light fixture for a light bulb.

MR. GARCIA: Your Honor – I'm sorry, Your Honor.

Q. (BY MR. GARCIA) Agent, that's a thing called a "ventosa," or a "cup." Okay? Had you ever seen that thing before?

A. No, sir.

Q. Okay. Was that procedure, or was that thing ever put on you when you went?

A. No, sir.

Q. So if your medical records reflected that that service was performed on you, would that be incorrect?

A. Yes, sir, definitely.

Q. Okay. Would it also be incorrect, Agent Lopez, that on August 21st, if your record reflected that you were – that you had chronic pain today, would that be [10-112] incorrect?

A. Yes, sir, that would be incorrect.

Q. Did you maintain, throughout your undercover, that you had no injury?

A. For the most part, yes, sir.

Q. Okay. But you did complain of headaches at one time?

A. Yes, sir.

Q. Okay. But you had no – you did not ever tell anyone – or did you tell anyone – that you had pain to your – cervical and lumbar pain?

A. No, sir.

Q. And did you tell anyone – when you met with Dr. Bieganowski, did you receive psychological support in those few minutes you met with him?

A. No, sir.

Q. Oh. If there was a medical report reflecting that Dr. Bieganowski saw you on July 26th of 1995, would that be a false report?

A. Yes, sir, it would be.

Q. I believe you only saw Diaz and Untersee that day; is that correct?

A. That's correct.

Q. And you saw Bieganowski the 27th?

A. The following day, yes, sir.

[10-113] MR. GARCIA: Your Honor, may I have a second?

THE COURT: You may.

Q. (BY MR. GARCIA) At the time of this incident, were you physically – or relatively physically fit, or enhanced physically fit or –

A. Yes, sir, I was.

Q. I mean, do you work out, or are you just –

A. At that point, I was working out, so I wasn't in bad shape.

Q. Now, Agent, when you went to the doctor, would it be an incorrect statement that you had any impairment? Would you say you had any impairment?

A. No, sir.

Q. Okay. So if a report reflected that you were approximately 10 percent impaired, would that be an incorrect statement?

A. Yes, sir. I don't know what that means.

Q. I'm sorry?

A. I wouldn't know what that means, either.

Q. Well, would you – let me put the question this way. Did you have any impairment?

A. No, sir.

Q. So 10 percent is more than none?

A. Yes, sir.

Q. Now, on October the 18th – on October the 18th, [10-114] since you – October 18th, which is subsequent in time to July 26th of 1995, if you had an impairment rating of five, did you have any impairment in August of 1995 – I mean, October of 1995?

A. No, sir.

Q. So again, five is greater than zero, so would that be more than what was – what is the truth?

A. Right.

Q. You had no impairment?

A. No, sir, no impairment.

Q. Now, Agent, do you see Dr. Bieganowski in the courtroom?

A. Yes, sir, I do.

Q. Would you please point to him and describe an article of clothing which he is wearing?

A. He's wearing a gray suit, light gray hair, with the gray tie and white shirt.

Q. And he has no patch?

A. Correct.

MR. GARCIA: Your Honor, may the record reflect that he's identified Arthur C. Bieganowski?

THE COURT: The record will so reflect.

Q. (BY MR. GARCIA) Do you see Gustavo Diaz in the courtroom at this time?

A. Yes, sir, I do. He's the gentleman with the [10-115] darker suit with the hair kind of slicked back.

MR. GARCIA: Your Honor, may the record reflect that he's identified Gustavo Diaz?

THE COURT: So reflected.

Q. (BY MR. GARCIA) Do you see Jesse Jaime Lopez in the courtroom at this time?

A. Yes, sir, I do. He's the gentleman in the back with the glasses, sitting next to Ms. Stillinger.

MR. GARCIA: Your Honor, may the record reflect that he's identified the Defendant Lopez?

THE COURT: So reflect.

MR. GARCIA: Your Honor, the Government passes the witness.

THE COURT: Mr. Roberts or Mr. Smith?

MR. ROBERTS: Yes, Your Honor.

Your Honor, it is my understanding that the Government may have found some of the tapes that are available. And it is also my understanding that the evidence of these transcripts is not the evidence, but the actual tapes that need to be played for the jury. I don't know if it's better to play them before my cross-examination or afterwards. But the transcripts --

THE COURT: It has not been admitted. I don't know that they are relevant. What's the deal with the [10-116] tapes?

MR. GARCIA: Your Honor, I was mistaken when I asked – this is what happened. When we were preparing the evidence, we were putting the transcripts together with all the tapes. When we were putting them together, we instructed an agent to make sure that the final two tapes, which were not with the other tapes, were brought in and put in a package.

The agent didn't understand that. He's a new agent. He came back, brought the tapes to us, did not put them in the specific packages.

When I came to court, I assumed that they were already in there. When I went up to the stand and I saw that they weren't in there, I ad-libbed, and I said that we couldn't find them.

In actuality, after I sat back down, Agent Griego advised me that the tape was back at the office. That's where the tapes are.

So we do have them. We can have them here after lunch. But I'm finding out, Your Honor, that just for time – it was easier for me to solicit the information from the witness than to play the actual tapes, because they are kind of garbled.

But as Mr. Roberts indicated, they are the actual evidence, and so far the record, we want to admit [10-117] them, but I don't know how many more we're actually playing. But we will admit the other tapes, Your Honor. I can do it through Agent Sanabria-Garcia.

THE COURT: Do you want them now, Mr. Roberts, or do you want to go – or can you wait until after lunch?

MR. ROBERTS: Your Honor, I would like to play the tapes now for the jury.

THE COURT: Can we get them, Mr. Garcia?

MR. GARCIA: I'm sorry, Your Honor?

THE COURT: Can you get those tapes right now?

MR. GARCIA: Yes, Your Honor, we can get them.

MR. ROBERTS: We can start with the tape that you have.

THE COURT: Well, you can start with all the tapes.

MR. GARCIA: Your Honor, I don't know if Mr. Roberts realizes this, but a lot of those tapes are hours. They wait for hours to see anyone. So we excerpted things

that were pertinent. That's what we played, was excerpts. And there's hours of waiting. And I'm just putting him on notice that he's – someone is going to fish through them to find what they are looking for, if it's something specific.

[10-118] But we have no objection to him doing that. I'm just letting the Court know that we can give him the tape and we can play whatever he wants, and we have no problem with that, but there are hours of just people sitting there and the agents are just talking, not – you know. And – but I just wanted to put everyone on notice.

MR. ROBERTS: Your Honor, I would request at this time, if that is the case, because I don't want to take up the court's time – we've not been provided with copies of these tapes, as I said. I'm not sure exactly what's on them where, and I need just a few minutes to do that, to do that – to do what I want to do.

I would request that if we can take an early recess for lunch, and maybe I can talk with the Government or anything –

THE COURT: No.

MR. GARCIA: Your Honor, I may respond? I mean, that's an untruth. We gave them the tapes months ago. They've had the tapes months and months.

If Mr. Roberts doesn't know where his tapes are, I am sorry. But he's had them. He's had an opportunity to review them. We've given him the transcripts. He's had them for months.

[10-119] Now, for him to come in here and say he's relying on the Government's, that's unfair.

THE COURT: Well, I'm not going to take a break right now. Get those tapes. Get those same tapes that are missing.

MR. GARCIA: Yes, your Honor.

THE COURT: We're not going to play them all, though.

MR. GARCIA: Yes, Your Honor.

THE COURT: We're not going to be here hours.

Continue with your cross.

MR. ROBERTS: Your Honor, just one second.

CROSS-EXAMINATION

BY MR. ROBERTS:

Q. Agent, when you got into this case, you were briefed by the supervising agent, were you not, James Griego?

A. Yes; that's correct.

Q. Had he mentioned a previous undercover operation that the FBI –

MR. GARCIA: Objection, Your Honor. Hearsay.

THE COURT: Well, overruled.

MR. ROBERTS: I'm not asking about proof, Your Honor.

Q. (BY MR. ROBERTS) Had he mentioned a previous [10-120] undercover operation with the FBI at the Bieganowski office?

A. No, sir, I don't believe so.

Q. Okay. I'll try to refresh your memory. Did he mention anything about a – do you know an agent by the name of Melissa Salazar-Yanez?

A. No, sir, I don't.

Q. Okay. And so Mr. Griego did not mention that there had been a previous attempt for FBI agents to do an undercover operation?

MR. GARCIA: Your Honor, objection. That's a false statement and a false question. There's no basis –the FBI did not do a previous undercover operation. Yanez does not work for the FBI.

THE COURT: I'll sustain the objection.

MR. ROBERTS: Your Honor, I would object to Counsel testifying. I'm just asking a question. I'm not asking if it's true or false.

THE COURT: I'm sustaining the objection. Continue.

Q. (BY MR. ROBERTS) Now, Mr.- – Agent, first of all, where, specifically – and I'm referring to all of the transcripts – do you state specifically you were not injured?

A. Every time the question was posed to us.

[10-121] Q. That is not an answer to my question. Where is the first time you state that you were not injured? I'm not saying, no pain. You're saying, I am not injured, those words.

A. I'd have to – I can't recall right off the bat, sir.

Q. Well, did you tell Mr. Griego that at the very first meeting?

A. Yes, we did.

Q. Well, let's go down that, first. Who do you first talk to?

A. Mr. Griego.

Q. And is it over the phone?

A. No, sir.

Q. You go in to see him?

A. Yes.

Q. Okay. What date would that be?

A. The 26th.

Q. The 26th. And you specifically say, We were not injured?

A. Yes, sir. After he goes in there, his whole spiel about the settlement, and we were really not given much of an opportunity to say anything. He's talking about the money, the settlement. And there's a point in the conversation where – where we told him – [10-122] well, went over the – what happened the day of the supposed car wreck.

Q. Uh-huh.

A. And we told him that we – because of the problems we had, we went ahead and got the ambulance, and we got there, and none of us were treated, because there was nothing wrong with us.

Q. Okay. Now, when you say – you said there was nothing wrong with you?

A. Yes, sir. We left. We left the hospital.

Q. Where in that transcript do you say that?

A. Bear with me. It's a 70-page transcript.

When we got to the point of filling out the forms is when we – when we told him. We said, "We can't answer these questions, because we don't have injuries." I believe that's when we – when we first –

Q. Well, where is that?

MR. ROBERTS: Your Honor, I need to get my exhibit list. Just a second.

THE COURT: You may.

A. Okay. On page 7, sir.

Q. (BY MR. ROBERTS) Okay.

A. We're telling – he's talking to us about waiting the six months for the – you know, six months, a [10-123] year, two years, before we settle on anything.

And then I told him that – the reason we went to the hospital and whatnot. And I told him that they looked her over, and we basically left, because she was okay, referring to my – to Agent Garcia.

And I said, "And I'm okay."

And then we keep going on and he says, "Let the doctor give you an examination," that I wasn't a doctor, he's not a doctor, and you're not the doctors. And that's where he's talking about us just doing our visits.

Q. Okay.

A. So that may have been the first – first time.

Q. Okay. So what you're saying is is that you're – you say that when you say, We're okay, is the same as saying that you were uninjured?

A. Yes, sir; that's correct.

Q. Okay. Now, one further matter. Didn't you tell him in other pars of the transcript that – or this tape recording, that – that you had left the hospital because you didn't have insurance and didn't want to fill out the paper forms?

A. I believe so, sir.

Q. Okay. So you had given him two different explanations of why you left the hospital?

[10-124] A. Well, it was very – yeah, I believe so. That's correct. But it's very clear that we were okay, when he was talking about the settlement.

Q. Clear, you say. Okay. Now, one, you-all in the FBI had caused a totally fake accident report to be issued, right?

A. That's correct.

Q. Okay. And this accident report noted that there were possibly injuries, right?

A. I don't recall, sir.

Q. Well, you didn't look at the report?

A. Well, I did. I don't recall if that was listed or not, that there were possible injuries.

Q. Okay. So it could have been, for all you know?

A. It's possible, yes, sir.

Q. Yeah. Okay. But –

MR. ROBERTS: Where is Government's Exhibit 11?

THE COURT: It's right in there.

MR. ROBERTS: Is it before the witness, Your Honor? May I approach the witness?

THE COURT: No, the accident report. 11. Are they all over there?

THE CLERK: I believe it's there, Judge.

MR. ROBERTS: I don't think he knows it's there, but I think it is.

[10-125] THE COURT: Approach. You may approach.

MR. ROBERTS: Thank you, Your Honor.

Does anybody know where Government's Exhibit 11 is? I'll use my own copy.

THE COURT: We need to find it. Be sure it's not there.

THE CLERK: It's not, Judge.

Q. (BY MR. ROBERTS) I'll show you –

MR. ROBERTS: Your Honor, can I approach the witness?

THE COURT: You may.

Q. (BY MR. ROBERTS) – which is a copy of that – purports to be.

Can you take a look at that?

Okay. Now, it has an injury code on it that – I think it's marked possible injury.

A. I don't see it, sir.

Q. Okay. I'll get on with another matter.

THE COURT: Approach him and help him. Show him where it's at.

MR. ROBERTS: We may be missing one part of this, Your Honor, I'm sorry. Your Honor, can I confer with co-counsel for just a second?

THE COURT: You may.

MR. ROBERTS: My eyesight is so poor I cannot see [10-126] it on this copy.

Q. (BY MR. ROBERTS) I'm going to mark on this exhibit so that you can see it, because this is a copy, and it's very fine print.

If you notice under the injury code, okay, that possible injury is being "C," and if you notice, your name and Ms. Salinas as "Cs"?

A. Okay.

Q. The different people. So you-all in the FBI have prepared a report that left open whether you were injured or not, right?

A. According to this I believe so.

Q. Right. And it also mentions that you were taken to the hospital?

A. Yes.

Q. Okay. And you tell Mr. Diaz, on the other hand, that you guys left the hospital because you didn't have enough time to fill out the paperwork and you had no insurance?

A. And we didn't need treatment.

Q. Okay. But one of the explanations you gave Diaz is you didn't have insurance, okay, and that you didn't want to stay to fill out the paperwork.

A. That's correct.

Q. So you never really even got examined at the [10-127] hospital. That's what you're telling Diaz?

A. Right. That's correct.

Q. Because you felt they weren't going to treat you because you didn't have insurance, you were just going to fill out a lot of paperwork and maybe not even be seen.

A. Your Honor, I don't think it was that involved, sir, because it was either – no, we didn't get treatment, and that was it.

MR. ORTEGA: I believe Counsel is talking about Mr. Griego and not Mr. Diaz.

MR. ROBERTS: I'm sorry. Griego. I'm sorry.

Q. (BY MR. ROBERTS) But anyway, the – it's Agent Lopez. When I say Diaz, that's who you were pretending to be, right?

A. Oh, yes. Right.

Q. Okay. I'm sorry. And what I'm talking about is, Agent Lopez, is that – that – that – in – in this – this scenario, you told Mr.- – Mr.- – excuse me – Mr. Griego that you had not been examined, right?

A. That's correct.

Q. Okay. Now, he told you, did he not, as to what you've already testified to, that in his understanding, that you really should be seen by a [10-128] doctor before you made that – that decision?

A. Decision to –

Q. As to whether you were hurt or not?

A. That's correct.

Q. Didn't he tell you, You ought to leave that up to the doctor?

A. Yes. He said that several times.

Q. Okay. Now, did you disagree with that?

A. No, we didn't.

Q. Okay. Now, let's go back just a few steps from this.

A. Okay.

Q. First of all, you were not the person you were pretending to be, right?

A. Correct.

Q. You had not been in this accident?

A. Correct.

Q. Right? And Agent – the other female agent that was with you, she had not been in the accident, right?

A. Correct. That's correct.

Q. And she said she was pregnant, and she had not been pregnant?

A. That's correct.

Q. Okay. So you-all could not possibly feel – I mean, objectively or subjectively – let's say it's [10-129] subjectively – you guys could not feel like an accident victim, right?

A. Correct.

Q. Because you hadn't even been in an accident at all?

A. Correct.

Q. Right? But you didn't tell him that, right?

A. Correct.

Q. And you knew that he had access to this. Okay?

A. Right.

Q. This report right here, right, because that's how he got your name to begin with, right?

A. That's my understanding, yes, sir.

Q. In other words, you guys generated the reports, and these people picked them up and started giving you guys calls, right?

A. That's correct.

Q. Okay. And one of the calls was from Mr. Griego, who, obviously, had in his possession that accident report?

A. I believe so, yes, sir.

Q. And that accident report details a very – a semisignificant rear-end collision, does it not? I mean, it says in an area where the speed limit is 35?

A. Right.

[10-130] Q. It's talking about a rather big vehicle, you know, slamming into the back of a Bonneville Pontiac, right?

A. Or whatever it is.

Q. Correct?

A. Correct.

Q. And it shows – the other thing it shows is a greater than $500 property damage?

A. Would that be on this report, as well?

Q. Yes. Yes.

A. I don't recall that when we reviewed it.

Q. Okay.

MR. ROBERTS: Your Honor, I can get Mr. Smith just to check it, to certify that it's there. I just can't read that piece of paper.

THE COURT: You may approach.

MR. ROBERTS: I'll go into another matter, Your Honor.

Q. (BY MR. ROBERTS) Now, Agent Lopez, let's just assume, for the purposes of evidence, it did say that there was a greater than $500 property damage. Okay?

A. Okay.

Q. As to both vehicles. You realized that the medical profession has an obligation to find out – to find out what is wrong with you?

A. Correct.

[10-131] Q. Okay?

MR. GARCIA: Your Honor, I'm going to object to assuming facts not in evidence. I can't even find this $500. Maybe if they can point it out to someone.

THE COURT: I'll sustain the objection.

MR. ROBERTS: Okay. Detective Mummert has already testified to it, Your Honor. It's already in evidence, but I will show it to the prosecutor, because David has pointed it out to me.

MR. GARCIA: Your Honor, what I'm reading says, "In your opinion" – is this office – okay. It does say that.

MR. ROBERTS: Your Honor, can I approach the witness?

THE COURT: You may approach.

Q. (BY MR. ROBERTS) These forms are impossible to read. But if I were to show you – I've lost it again.

A. Yeah, it's right here.

Q. "In your opinion, did this accident result in at least $500 in damages to one person's property?"

A. Yes.

Q. Okay. Now, going back to the previous question I started to ask: You realize that the medical profession has a duty to find out what is wrong with [10-132] you, even if you say you're not injured?

MR. GARCIA: Objection, Your Honor. He's not an expert, to my knowledge. He hasn't been qualified as an expert, and he's assuming facts not in evidence. And he's also speculating as to what a doctor should know, what a doctor is supposed to –

THE COURT: I'm sustaining the objection, Mr. Garcia.

Q. (BY MR. ROBERTS) Okay. Did you make any inquiry, okay, as to the procedures, the proper medical procedures or whatever, that should have been given you and the female agent that you were with, given this kind of accident and the fact that you had not been medically examined?

MR. GARCIA: Objection to the vagueness of the question, your Honor. What proper medical procedures was he supposed to inquire to? I don't understand the nature of the question. Of whom is he supposed to inquire?

THE COURT: Just let him answer.

If you can remember the question, answer it.

A. Can you rephrase it? Can you ask it again?

Q. (BY MR. ROBERTS) Yeah. Did you guys look into what should be the proper medical practice, given this kind of report –

[10-133] A. Right.

Q. – and – and the fact that you guys were taken to the hospital and whatever, but had not been examined, that the medical profession was supposed to do in these cases?

A. No, sir, we didn't. Again, there was no accident.

Q. Well, I know that. But you never told anybody there was no accident, right?

A. Correct.

Q. So these people were believing that you were in an accident, right?

A. Correct.

Q. And they are believing that this other agent is pregnant?

A. That's correct.

Q. Right?

So you didn't really look in to see what a normal – you know, in the State of Texas, what a normal medical facility should do, given this accident report?

A. That's correct. No, we didn't.

Q. And – and – and the other facts of this case, that you were taken to a hospital, but decided not to be examined?

A. That's correct.

[10-134] Q. Okay. Now, let's just go down and set up some time frames here.

Now, first of all, you see doctor – you see Mr. Robert Griego; is that right?

A. Yes, sir; that's correct.

Q. Okay. And you see him on the 26th?

A. Yes.

Q. Okay. Now, there's a transcript of that; isn't there?

A. Yes, sir, there is.

Q. And a tape?

A. Yes.

Q. Okay. Now, secondly – what is the second contact you have with anybody that might be connected to Dr. Bieganowski?

A. On that day?

Q. On that day, or what's the next contact, whether it's on that day or another day?

A. On that day, it was – I believe it was George Lozano.

Q. Was that over the telephone?

A. No, sir. We were filling out some forms.

Q. Okay.

A. After that, I believe that's when – let me double-check it, sir. Yes, sir, George Lozano.

[10-135] Q. Okay. And do you have a tape of that?

A. It was all the same – the same day. It was all the same recording.

Q. Same recording, okay. Now, that would be the 26th, correct?

A. Right, yes, sir.

Q. Okay.

A. We were filling out forms, and then we – Mr. Griego comes back in again –

Q. Okay.

A. – because we had some questions.

Q. Who is the next person you see?

A. After him, we see Mr. Griego again, because he helps us fill out the forms –

Q. Okay.

A. – on some of the questions we had as to our injuries.

Q. Okay.

A. And I believe it's Gustavo Diaz after that, who is a physician's assistant, who does the examination.

Q. Okay. Those are all – those are all recorded?

A. Yes, sir.

Q. On the tapes?

A. Dr. Untersee.

Q. That's also on the 26th?

[10-136] A. Yes, sir.

Q. Okay. And you also have a tape of that?

A. All this is one tape, sir.

Q. Okay.

A. It's one long recording; several hours, actually.

Q. Oh, okay. But there's some waiting time, right?

A. Oh, absolutely.

Q. Okay. And did you-all – I notice that you kind of made an evaluation that there's a lot of waiting time?

A. Yes, sir.

Q. Is that right?

A. Correct.

Q. But you've been to a doctor's office before in your life, have you not?

A. Yes, sir.

Q. Have you ever waited any?

A. Yes, sir.

Q. Okay. Sometimes it's as much as an hour or two hours, just sitting there?

A. Not in the United States, no, sir.

Q. Oh, okay. Now, we're down to -- on the 26th, we're talking about – now, this was a chiropractor, Mr. Untersee?

A. Yes, sir.

[10-137] Q. Let's just spend a few minutes on that. Now, Dr. Untersee, the chiropractor, he took an x-ray of your neck and back; is that right?

A. No, sir, he didn't.

Q. He didn't?

A. No.

Q. Did he have it done?

A. Initially, as I was saying, George Lozano had recommended the ac- – it started with Mr. Griego, but George Lozano had rec- – had advised that I was going to get x-rays.

Q. Uh-huh.

A. Because we hadn't seen anybody at this point –

Q. Uh-huh.

A. – since Mr. Griego.

Mr. Lozano advised we were going to get x-rays. We filled out our forms, and we were asking Mr. Griego as to what we – you know, we told him, "We don't have any problems, what do you want me to put down?"

And he says, "Go ahead and write down you're in pain, your pain is in your neck and your back, or your neck."

We go see Gustavo Diaz, who also – I mean, he may have mentioned x-rays, but Untersee was the doctor who cut back the amount of x-rays, because it looks like [10-138] they were obviously – I was going to get more x-rays than what I needed.

Q. Okay. Well, let's go back to the original question.

Did Untersee see that – who got you x-rayed? I'll just ask the question.

A. Well, I don't know. I wouldn't know to tell you who that was.

Q. But you were x-rayed?

A. Yes, sir, I was.

Q. Okay. And did Untersee review that x-ray?

A. I don't believe so, sir. I don't know that anybody reviewed them.

Q. Oh, okay. Now, did you participate in the search of Dr. Bieganowski's office?

A. No, sir. I was gone from El Paso.

Q. Okay. And so have you, at any point, reviewed the medical file of yourself that was seized from that office?

A. Recently, yes, sir.

Q. Okay. Are there x-rays there?

A. No, not that I recall.

Q. Okay.

A. But they were done. There were 12 of them that were taken.

[10-139] Q. Okay. Now, we're down to Untersee on the 26th. Who else do you see after that, and when?

A. I don't think we saw anybody after that. There's an unknown female – oh, we saw Robert Griego again.

Q. Okay.

A. And that was it.

Q. Okay. Now, did Untersee – did he find that you – you had some neck and upper back spasms, or a problem?

A. If I may – I don't remember exactly what it was – what the terminology was.

Q. Yeah.

A. He conducted the examination.

Q. Uh-huh.

A. And he's asking me – that if certain things that he did to me strained my back.

I told him, "No."

Q. Okay.

A. He pulled on my shoulders, and I told him, "No, that didn't hurt."

Then he asked me if Diaz wanted any – if he had ordered x-rays. So I took that to be the physician's assistant, Gustavo Diaz.

Q. Uh-huh.

A. And I believe he was asking Agent Garcia that. [10-140] And she said, "No."

And then on me, they talked about a scalp view – of x-rays. He didn't explain why.

Q. Okay. Now, where do you tell Dr. Untersee that you are not injured?

A. That – I don't believe that ever came up, sir.

Q. Okay.

A. At all. Again, we went from one person to one person to one person. It sounded like each one would tell each other. That was the impression we had, that one – Mr. Diaz told – possibly told Untersee, It's his neck, and Griego had told Diaz it was my neck, our neck, or things like that.

So I don't – I don't believe we ever told him that we weren't injured.

Q. Okay. But you said that in the point where you tell Robert Griego that you're not injured, all you do is say, Oh, well, we're okay.

A. No. It was more detailed when we filled out the forms that he gave us, because we – he would be talking about subsequent pain, and he was talking about all these other things.

Q. Uh-huh.

A. And he made it very clear, Just put neck and back, leading me to believe that that's what he did all the [10-141] time when people came in.

Q. Yeah.

A. So we're asking, you know, What do we put here? We're not injured. I mean, it was very clear that there's nothing wrong with us to him.

Q. Well, but – it's very clear, but it's – isn't it very clear because you're an FBI agent, who's just pretending to be injured, that you're not injured? I mean, is – with this accident report and with the language that you use, Oh, we think we're okay, we think we're fine, is it clear that you're not injured?

MR. GARCIA: Your Honor, I'm going to object to assuming facts not into evidence at this time. I've given Mr. Roberts a lot of latitude. No one has testified that the medical staff used the accident report as part of their medical records.

We have the medical records here. There are no accident reports in them. So until a witness testifies that medical reports were made part of – that the police reports were made part of the medical reports, how can he even assume that anyone knew that the accident report reflected anything? No one said that.

THE COURT: Mr. Roberts?

MR. ROBERTS: Your Honor, Robert Griego, in the [10-142] transcripts, discusses the accident report and whatever, and they know that he has it. And he's part of the staff here, allegedly.

MR. GARCIA: And, Your Honor, again, Robert Griego is the runner, the solicitor. He is not the doctor, he's not the physical – if Mr. Roberts wants to stipulate that the medical – that the police report was given to Jesse Lopez, Gustavo Diaz and Dr. Bieganowski, then he can stipulate to that, and we have no objection.

But he needs to get it into evidence before he starts talking to it as if it was a piece of a medical record within their office.

THE COURT: Mr. Roberts?

MR. GARCIA: Are you prepared to stipulate?

MR. ROBERTS: Your Honor, I – I do not know that, as to all of those people, whether they – they all viewed it. I do know that Robert Griego –

THE COURT: Well, we all know that he did. Limit it to Robert Griego.

MR. ROBERTS: Okay.

Q. (BY MR. ROBERTS) Now, Agent, the other question that I have is this, is, if – where do you tell Mr. Diaz – and I'm not saying, no pain in this area or that, that you were not injured? Now, you see him [10-143] on the 26th?

A. Correct.

Q. Where did you tell him, We're not injured?

A. As he was conducting his exam on us.

Q. Yes.

A. It wasn't a case of Mr. Diaz walked in and we shook his hand and said, I'm not injured. It was – it – he went straight to an examination.

Q. Uh-huh.

A. And he asked – the questions he asked, because we were doing range – it seemed like a range of motion

exam. We were both laid down on the table, and he was doing certain things with us.

Q. Uh-huh.

A. And every question he asked, Does this hurt, does this hurt? It was, No. Everything was, No.

So again, did we refer back to the car accident saying, Hey, we weren't hurt; no, we didn't. But everything that he asked, you know, Do you have headaches? No.

Q. Uh-huh.

A. You know, he brought up – we asked – he says, Did you hurt any part of your body?

We said, No, nothing – that there was nothing that we had – that we – that we had been hurt. [10-144] Nothing had hurt us.

Q. Okay. Where do you say, We were not hurt?

A. Those exact words, sir, I don't believe we used. It was just in answer – in response to all his questions.

Q. Okay.

A. He asked us, "What hurts or bothers you the most, as a result of this accident? Does your neck bother you a little bit, your back a little bit?"

We said, "No."

Q. Okay.

A. He asked me, "Do you have any headaches?"

I said, "No."

Have you previously had any back injury, anything like that?

No.

So I don't know how much more we can emphasize that we weren't hurt. We answered all his questions.

Q. Okay. But you are – just so I understand your testimony – you told Robert Griego that, We're okay?

A. Yes, sir.

Q. But you never said to anybody specifically, We're not injured, we're not hurt?

A. Page 46 of that same transcript, sir –

Q. Yes.

[10-145] A. – says, No injuries, or what hurts you, if anything?

Nothing. I feel – I feel fine.

Q. Okay. Now, you are aware that pain is not the only symptom of being injured, right?

A. I guess – no, I don't. I –

Q. I'm asking.

A. I've never had a real serious injury. I mean –

Q. Okay. The lack of motion, tenseness, all of this kind of stuff – have you ever been examined, like, by a masseuse, a doctor or anything, that's kind of felt in your neck or your back or something –

A. A doctor, yes.

Q. – for a problem? Okay. Besides Dr. Bieganowski?

A. For more – more so for throat infection. That's it.

Q. Oh, okay. But nothing with, like, muscles?

A. No, sir. Not in regarding to a back injury or something like that.

Q. Okay. And now, we've got down to – I think we've covered the 26th.

When is the next time you have contact with the – with the Bieganowski –

A. The following day, sir, the 27th.

Q. The 27th. Who do you see on the 27th?

[10-146] A. The first person we see is Robert Griego again.

Q. Okay. And there, do you specifically say, We're not injured, or, We're not hurt?

A. The conversation started out with him getting after us about – he said, "The doctor brought this up. You keep saying there's nothing wrong with you, there's nothing wrong with you. It's making him look like he's scamming the insurance."

Q. Okay. Now –

A. So we –

Q. – which doctor is he talking about?

A. Well, at that point, the only person we had seen was Gustavo Diaz, who said he was a physician's assistant

to Dr. Bieganowski. So we assumed that he was talking about Dr. Bieganowski.

Q. Well, that's not true, Agent. Isn't it true that you had seen Dr. Untersee, the chiropractor?

MR. GARCIA: Objection, Your Honor. That wasn't his question. He asked him, Who did you infer, and he told him, I inferred it was Dr. Bieganowski. He's being argumentative.

THE COURT: Overruled.

Answer the question.

A. Can you ask the question again?

Q. (BY MR. ROBERTS) Isn't it true that you had [10-147] already seen Dr. Untersee?

A. We'd seen – yes, sir, the chiropractor.

Q. And that when he's saying the doctor is saying this or that, that he may have been referring to Untersee, because you hadn't even seen Bieganowski, right?

A. That's possible, sir. Yes, sir.

Q. Oh, okay.

A. However, in our earlier conversations with him over the telephone, he was very clear to tell us who he represented, who he worked for.

Q. I understand. But they were all in a medical practice together. That's your allegations, right?

A. I –

Q. Untersee?

A. They were all in the same building.

Q. Okay.

A. That's all I knew.

Q. Now, you saw – you saw Robert Griego. Who did you see on the 27th?

A. We saw Mr. Griego, Jesse Lopez.

Q. Yes.

A. And I believe that was it. We saw Gracie, who is Victor Bieganowski's secretary.

Q. Okay.

[10-148] A. And I believe that was all, sir.

Q. Did you see Dr. Bieganowski?

A. Oh, yes, sir. Yes, sir. We saw him that day also. Sorry.

Q. Now, you have a tape of that?

A. Yes, sir.

Q. Okay. And Dr. Bieganowski examined you on that day, right?

A. Yes, sir.

Q. Okay. Now when is the next time you have contact with their office?

A. (No verbal response.)

Q. Now, first of all, did you see – the only time I guess you say you've seen Mr. Diaz was briefly on the 26th; is that right?

A. Yes, sir.

Q. Did you ever see him again?

A. No, sir, I don't think so.

Q. Okay. Now, on the 27th, you see Dr. Bieganowski. Then, is there anybody else you see on the 27th?

A. Dr. Bieganowski, and again, Gracie –

Q. Uh-huh.

A. – the secretary.

Q. Yeah.

A. And Jesse Lopez.

[10-149] Q. Jesse Lopez. And he's the physical therapist?

A. Yes, sir.

Q. And he's also included in this tape; is that right?

A. Yes.

Q. Okay. Now, when is the next time you have contact with the Bieganowski medical practice?

A. We had – I believe we had telephonic contact in between there, because we weren't showing up to all our sessions.

Q. Yeah.

A. And I believe the next actual contact was August 14th, and then again August 21st.

Q. August 14th. Who did you see on August 14th?

A. Dr. Bieganowski, I believe.

Q. Okay.

A. Or I – I would have to look at the transcript to make sure, sir.

At this point, Agent Garcia was undergoing more treatment than I was. So some of the visits, we may not have seen anybody.

Q. Okay. Were you aware that – this was your second visit with Dr. Bieganowski?

A. Yes, sir, I believe so.

Q. On the 14th?

[10-150] A. Yes.

Q. Are you aware that – that at that point, he wanted to release you from further medical care?

A. Well, when I look at this transcript, that – we had a – it seemed like he was a little upset that – that was my perception then, because of the conversation we had –

Q. Uh-huh.

A. – where he told me that I wasn't diplomatic.

Q. It seemed like he was upset?

A. Well, again, this was my perception.

Q. From reading the transcript?

A. Well, no, it is – my recollection of the conversation was that – that – I told him I didn't have any aches or pains anywhere. And – well, anyway, he was – we – we saw him that day, and it was very short. And it just seemed like he was upset, because, obviously, we hadn't been going, or – or I couldn't actually say why.

Q. But isn't it true that in this – in the tape itself, it shows a lot of joking and chuckling back and forth on the 14th, where you guys are talking friendly to each other the whole time?

A. He was always – he was always doing that with us. I mean, he was very cordial, if you will, very [10-151] polite, very – he was calling Agent Garcia mom, you know, for someone he didn't know.

Q. Okay.

A. So he was, I don't think, any different than any doctor.

Q. Well, where – where, in this tape, do you get the idea he's upset with you?

A. May I? On page 5, sir.

Q. Yes.

A. Okay. I think it's in the form of a question. He says, "You two are all finished. You feel good?"

And I told him, "We missed, probably, some appointments."

And he said, "Yeah, well" –

Then I say, "Yeah, well, I've been out of town, so she didn't want to come by herself – referring to Ms. Garcia."

"So how do you feel? Any aches or pains or anything?"

And I told him, "Not really."

"It's either yes or no."

I said, "Oh, no."

He goes, "What?"

And I said, "No."

And it was unintelligible at this part. But my [10-152] response to what he said was, "Well, I don't know. You tell us" – referring to, I believe, to release us or not. I don't know exactly.

And then he says, "Well, I know if you're – if you're not diplomatic, and that's fine. I have no problem with that. You don't have any aches or pains anywhere, that's fine. If you are, then you shouldn't because otherwise it will stick around and you'll keep having it. Funny way of not going away. What about you?"

Then he – when he was done with me, he went straight to Ms. Garcia.

Q. Okay. Now –

THE COURT: That's – that's enough for now. It's time for our lunch break.

Ladies and gentlemen, we'll reconvene at 2:00, promptly at 2:00.

(Lunch recess taken; open court; jury present.)

THE COURT: Mr. Roberts, you may continue.

MR. ROBERTS: Thank you, Your Honor.

Q. (BY MR. ROBERTS) Agent Lopez, in a brief summary of what you've said, basically, you said that they took no medical history of yours, right?

A. Yes, sir.

Q. They never took your temperature?

[10-153] A. No, sir.

Q. Okay. You've never indicated that you were hurt or had any pain or any bad effects from the accident?

A. Correct.

Q. And you never were wishy-washy about that, you were always definite, right?

A. As far as I recall yes, sir, for the most part.

Q. For the most part. Okay.

Now, I'd like to turn you to page 7 of the transcript on the 26th, if you could, sir.

A. Yes, sir, I do.

Q. If you still have those in front of you?

A. Yes, sir, I do.

Q. You've got it?

A. Yes, sir, I do.

Q. Okay. Now, do you see the part where it's the first time you do address him, and you say, "And also, we hurt a little bit afterwards?"

A. Yes, sir.

Q. What do you think that would indicate to Mr. Griego?

MR. GARCIA: Objection, Your Honor, speculation.

THE COURT: I'll sustain the objection.

Q. (BY MR. ROBERTS) Okay. Weren't you indicating to him that you hurt somewhat from the accident?

[10-154] A. We were referring to – in a case like that, we were referring to – well, again, the accident didn't occur, so we were referring to an injury that – not an injury, but whatever we may have felt shortly thereafter, like the time the car hit or something like that.

Q. So you admitted to him that you hurt a little bit after the accident?

A. Yes, sir. In that sense, we had.

Q. So you had been injured at least somewhat?

A. Well, injured, again, was not the word we used.

Q. I understand. You didn't use that word ever, right?

A. Right.

Q. But the word "hurt," doesn't it give that indication, as you're using it there, that there was some injury to cause that hurt?

A. When – when I made that comment, sir, if you keep reading, it was clarified to him, where Mr. Griego had said, Hey, let the doctor give you the examination. You're not the doctor.

Q. Okay. But you did tell him you hurt after the accident, right?

A. Yes, sir.

Q. Okay.

[10-155] A. A little bit afterwards

Q. Okay. Now, if we could turn to page 42 –

A. Same transcript?

Q. – the same transcript, on the 26th.

A. Okay.

Q. Okay. And Diaz is discussing the pregnancy of your pretended wife, right?

A. Yes, sir.

Q. Okay. So at least to that extent, there was a reference to medical history that had been done. What I'm saying is, to her medical history, being pregnant, right?

A. No. That came out on our part, as to why we went to the hospital.

Q. Yes.

A. Initially. But nothing that they had asked us –

Q. Okay.

A. – regarding her medical history and pregnancy.

Q. Okay. But he's talking about that, right, the pregnancy?

A. Correct.

Q. How are you doing with the pregnancy, et cetera, et cetera, right?

A. Yes.

Q. Okay. And that is a reference to this agent's [10-156] alleged medical history, I mean, of being pregnant, right?

A. I guess. I mean –

Q. Well, yeah. And you have to – Agent, you do understand that certain things are relevant with, like, a traffic accident in medical history, that might not be the same things that are relevant, like, if you have a throat infection, right?

A. Right.

Q. I mean, you won't say, you know, I was hit by a bus, I have a high temperature because of that?

A. Correct.

Q. You know, I mean, there's – some things don't – don't fit right?

A. Yes, sir.

Q. But pregnancy is one of them. And of course, as you might well imagine, pregnancy could be a real problem if you were – if you were in a significant accident?

A. Yes, sir, I imagine so.

Q. Okay. Now, if you could, turn to page 43. In the middle of it, Mr. Diaz asked, "Do you have any headaches or" – or – and Agent Sanabria, in front of you says, "Right now, no."

Right?

[10-157] A. Yes, sir.

Q. So that kind of left it in doubt of whether she had had headaches before, right?

A. I imagine so. You would have to ask her.

Q. Okay. Now, if we can turn to page 44, where Mr. Diaz says, "Did you hit any part of your body?"

Agent Sanabria says, "No."

And Diaz says, "Just the whiplashes?"

And Agent Sanabria says, "Uh-huh."

Do you see that?

A. Yes, sir.

Q. Could that have indicated to Physician's Assistant Diaz that maybe there had been shipleashes?

A. The whiplash itself, as we – as I understand it, is going to be something that's going to occur – that's a motion, not – it's a motion that your neck – obviously, if someone bangs you, it's just going to be a natural tendency to jerk back.

So in a case like this, when we were talking about that we had been hit from the back, as far as that was concerned, we said – we were answering his question to the motion, not so much the – you know, the injury.

Q. Yeah. And then Mr. Diaz, as a physician's assistant, later on the page, he's asking you-all if [10-158] you feel nervous, tense, uptight or, like, nightmares because of the accident?

A. He's asking agent Garcia that.

Q. Right. And she says, "A little"?

A. She says, "A little," yes.

Q. Yeah. Okay. So she's indicating that she's had some sort of nervous reaction, you know, since – it's associated with getting into a vehicle and he's asking –

MR. GARCIA: Your Honor, I'm going to object to the characterization of the facts. It's a disjunctive sentence.

THE COURT: Well, he can't testify as to what she's said, anyway.

MR. GARCIA: Okay. That's a disjunctive sentence.

Q. (BY MR. ROBERTS) And then Physician's Assistant Diaz says, "A little tension, a little anxiety?" Okay?

A. And then I – exactly. And then I said – I asked her if that was just from living with me.

Q. Right. And that way, you sort of cut her off, right?

A. Yes, sir.

Q. Because she was starting to say she had had a little bad effects from the accident, when she says, [10-159] "A little"?

A. Well, again, her answer, "A little" – he didn't – she didn't answer a little what, a little nervous, a little tense, a little uptight or what. He really didn't give her the opportunity to answer.

Q. I know. And then he asked the question again. And then you throw a joke in there and cut him off?

A. Yes, sir, correct.

Q. Okay. Because you don't want that answer, right?

A. Well, again, you would have to ask her, sir.

Q. No. I mean, you – you're the one that threw the joke in. You didn't want her to get specific on what anxiety or tension.

A. Well, she never answered the question, period.

Q. Well, you stopped her.

A. Again, she never answered the question.

Q. Okay. And don't you do that throughout these examinations, that if Agent Sanabria is starting to say, Oh, gee, don't you throw in a joke, Well, it's – you're sore because you're living with me, or you're always sore, or that kind of stuff, to keep her from saying stuff?

A. Well, sir, in this particular – with Mr. Diaz, there's nothing but lev- – if you listen to the tape, if you listen to tape –

[10-160] Q. Uh-huh.

A. – you'll see that there's nothing but levity in this whole examination. He's joking back and forth, so it was not out of context or out of character with the examination.

Q. Yeah. But my question is, don't you often, throughout all of these transcripts, when Agent Sanabria is starting to say that she's hurt this way, or anxious this

way, or has this, don't you throw a joke in or something and try to get her off that subject?

A. Not necessarily, sir, no.

Q. Okay. Now, if we could turn – if we could, same transcript, page 45. And you guys are talking to the physician's assistant, and you're sort of basically telling him you guys didn't have insurance, and they took a long time to see you, and that you left the hospital, right?

A. Yes, sir; that's correct.

Q. Okay. And then Physician's Assistant Diaz starts talking about, "Your health is normally good, you don't have any sickness or anything unusual"?

A. Yes, sir; that's correct.

Q. Now, you wouldn't consider that medical history?

A. Yeah, I suppose so.

[10-161] Q. Okay. Now, at the bottom of that page, Physician's Assistant Diaz: Had you previously had any injuries to your neck or back?

A. She answered, "No."

Q. I understand. But would you consider that an inquiry about her medical history?

A. Yes, sir, possibly.

Q. Okay. And then on page 47 with Physician's Assistant Diaz, he asked you, "Have you injured your back or head?"

A. Yes, sir.

Q. And that, of course, was from your – that was on your medical history?

A. Correct.

Q. Okay. Now, at that point, you guys go see Dr. Untersee; is that right?

A. Yes, sir.

Q. Okay. And that's – if I could refer you to page 56.

A. Okay.

Q. Okay. Untersee says something like, "Head forward as far as you can, keep sitting up straight. Does that pull between your shoulders?"

You say, "No."

But Agent Sanabria says, "It looks like it hurts."

[10-162] And Untersee says, "It looks like it hurts"?

And you guys are laughing.

A. Right.

Q. What is that about?

A. Well, some of the things that they were doing to us, sir, were things that we had never gone through before. So when your neck's going to get torqued one way and your back gets torqued another, the comment was, "It looks like it hurts."

There's – it was – nobody was saying it was hurting. We were talking about it looks like it really hurts.

Q. Okay. Now, you say you've never really had a significant traffic injury in your life?

A. No, sir.

Q. Okay. Do you know that – if Agent Sanabria had or has not, or –

A. I do not know that.

Q. Okay. Now, if we could turn to page 57?

A. Okay. Yes, sir.

Q. And Dr. Untersee is asking, "Where do you feel it, right or left side? Where do you feel it pulling?" Okay? At the very bottom of the page, 57?

A. Okay.

Q. And Agent Sanabria says, "Left side"?

[10-163] A. Yes, sir.

Q. Wasn't she indicating to him that her muscles were pulling on the left side?

A. I imagine so.

Q. Well, was he supposed to disbelieve her?

A. Well, no. Again, we've never gone through exams like that. So how much of that is natural, a natural reaction that the body has, as opposed to actually being injured? We didn't know. So –

Q. And you guys hadn't done any – you know, read any research materials or anything –

A. Correct.

Q. – to know what your range of motion should be –

A. That's correct, sir.

Q. – or whatever, or what would be the effects of an accident?

A. That's correct.

Q. Okay. And on page 58, Dr. Untersee talks about, you know, this full range of motion and that – that he finds there's a little strain there. It's about the fifth interchange down. A normal person can do the full range of motion?

A. Yes sir.

Q. Okay? Apparently, there was some difficulty in doing that full range of motion, whether it's because [10-164] you guys didn't work out or – or for some reason?

A. I can't – I'm not a doctor, sir, so I don't know.

Q. Okay. Now, at the bottom of the page, when he's again talking about limits to motion, normal is 80 degrees or something, extension back, and then he's talking to Agent Sanabria. And he says, "When you did that, you probably felt the discomfort right in here."

A. What page is that on?

Q. That's still on the same page, 58. It's down toward the bottom of the page. It's about the third exchange from the bottom.

Okay. And the extension back, without feeling anything, and, "When you did that, you probably felt the discomfort right in here?"

A. Oh, I see that. Okay.

Q. And that's what you remember him saying, right?

A. Yes, sir.

Q. Okay. And then Agent Sanabria says, "Uh-huh," yes?

A. Correct.

Q. Okay. And that would indicate to him –

MR. GARCIA: Objection, speculation, Your Honor.

THE COURT: I'll sustain the objection.

Q. (BY MR. ROBERTS) Okay. If we could go to the transcript of – let me make sure I get this right – [10-165] of July 27th. And this would be page 28. Are you able to find that?

A. Yes, sir.

Q. Okay. And about the middle of the page, "Therapist Lopez, 'Tell me what you feel. Is this tight?' "

And you say, "Yeah, it's not very" – something like that?

A. Yes, sir.

Q. But you do say the word yes, or yeah?

A. Right.

Q. Okay. Now, if we could turn to the transcript of August 14th.

A. I don't have that transcript up here.

THE COURT: It's not in evidence.

MR. GARCIA: It's not in evidence.

Q. (BY MR. ROBERTS) Okay. Now, do you recall – do you recall –

MR. ROBERTS: At this time, Your Honor, I would move to admit that evidence on the 14th, since they have found the tape, if they have that transcript.

MR. GARCIA: May I have a second, Your Honor?

THE COURT: You may.

Exhibit 28.

MR. GARCIA: Your Honor – do you want the 14th or [10-166] 21st?

MR. ROBERTS: Just one second, Your Honor.

THE COURT: If you want to admit all of them –

MR. ROBERTS: I would like to admit them all, Your Honor.

THE COURT: It's up to you-all.

MR. ROBERTS: Now that we have the transcript.

MR. GARCIA: Your Honor, we have no objection to admitting them. We have – Your Honor, we have Government's Exhibit 18A and 18, which is 8/21.

THE COURT: That's been admitted already.

MR. GARCIA: That was one admitted, Your Honor?

THE COURT: It has been admitted.

MR. ROBERTS: Okay. I would like to present that to him.

THE COURT: August 21st, is it?

THE WITNESS: Yes, sir.

MR. ROBERTS: I believe this is August 21st, Your Honor.

Q. (BY MR. ROBERTS) Now, in this one, if I were to refer you to page 6 on the 21st – okay? There's an "M" talking.

Who is that?

I would suggest – I think it's a Maribel Mata.

A. Yes. This is – I don't know if that's the [10-167] biofeedback lady or not.

Q. Okay.

A. But I believe it's a Maribel Mata.

Q. And I believe, during that transcript, the inquiry is made to Agent Sanabria, "Do you feel still – still feel nervous when you're in the car?"

"Yeah, I do."

A. That's correct.

Q. Okay. Are you familiar – are you familiar with what's called a "posttraumatic stress syndrome," or ever heard of that?

A. Yes. I mean, I'm familiar, in the course of the investigation.

Q. Okay. But that's just when some traumatic event – it could be a rear end accident, it could be something happening in law enforcement?

MR. GARCIA: Your Honor, objection. He's testifying. Does he have a question?

MR. ROBERTS: I'm asking that –

Q. (BY MR. ROBERTS) Wasn't this inquiry – seemed to be based toward that?

MR. GARCIA: Objection, speculation.

A. I don't know.

Q. (BY MR. ROBERTS) You don't know?

A. I don't know.

[10-168] THE COURT: I'll sustain the objection.

A. The first time –

THE COURT: I've sustained the objection. You don't have to answer.

Q. (BY MR. ROBERTS) Now, again, turn to page 9. I believe this is, again, on the 21st.

Dr. Bieganowski is talking to Agent Sanabria. "Is your back sore, mom?"

And she says, "A little bit."

A. Yes, sir.

Q. Isn't she indicating that she's hurting?

A. Again, you would have to ask her. According to this, I would say she was.

Q. Okay. And then it says, "Is your neck sore, mom?"

And she says, "Not so much."

Okay?

A. Correct.

Q. But that, of course, does indicate there's some problem there?

A. Well, Mr. Roberts, in the course of this evaluation and in a couple that we had with Dr. Bieganowski, there were some – as he was feeling our neck or back, I imagine the neurologist knows where the pressure points are on the body.

Q. Uh-huh.

[10-169] A. So it's just a matter of torquing a certain – you can make something hurt if you push it hard enough.

Q. So that's your allegation, that he was making the – Agent Sanabria's neck hurt?

A. Well, I – I don't recall exactly how – how this – how this happened, how this meeting occurred. But you'd need to ask her.

Q. Okay.

A. But that did – that did occur.

Q. Okay. And then, as we go further, Dr. Bieganowski says – asks, "When I get down here" – to Agent Sanabria – "it's sore right?"

Well – do you see that?

A. What page are you on, sir?

Q. We're still on –

A. Page 9?

Q. – page 9.

A. Okay.

Q. And it's in the very middle of the page. When I get down here, it's sore, right?

Well – yes?

A. Yes, sir.

Q. And then you toss in another one of your jokes, "She always complains, you're something else?"

A. Correct, sir.

[10-170] Q. Okay. To stop her from answering?

A. Well, I tossed in the joke.

Q. And Bieganowski – Dr. Bieganowski is saying, "She's been complaining about her lower back?"

And then you toss in another joke, "She always complains, period"?

A. Yes, sir.

Q. Okay.

A. And I said, "She is an avid complainer."

And then he tosses in his comments, that, "No, she never complained, she never complained before she got pregnant, right?"

And I said, "Yeah."

Q. Now, again, on – on page 11.

A. Yes sir.

Q. At the very, very bottom of the page. And you-all are talking to Dr. Bieganowski. You admitted that, "Yeah, initially I felt some discomfort in my neck or my back, because I didn't want to make the call."

A. Yes, sir.

Q. Weren't you indicating to the doctor that you had – had suffered pain because of the accident?

A. Yeah, it's possible.

Q. Okay. And then on page 12, Dr. Bieganowski asks, "But it's still a little tender right? Yes no?"

[10-171] And you answered, "Yeah, it feels a little tender."

A. Again, the – he was going through the same examination with me as he had done with her.

Q. Yeah.

A. And the points that he was touching, again, were easy enough to solicit a response that something hurt.

Q. Well, you don't know if he was soliciting a response or your neck was a little tender?

A. Well – and I don't know that he wasn't. So again, if somebody torques you hard enough, you're going to feel something.

Q. Okay.

A. It's almost the same as if there is somebody poking you and you flinch and say, No, that didn't hurt. Well –

Q. But you're not saying you didn't have the tenderness there from – God knows what reason, stress, whatever?

A. Obviously.

Q. Okay. Now, on page 16.

A. Yes, sir.

Q. This is one page, page 16, 17, and whatever. You're obviously having your temperature taken?

A. I believe this is Agent Garcia.

[10-172] Q. All right. Okay. Were you there when that was done?

A. No, I wasn't.

Q. Okay. Now, I want you to go back to the visit on the 14th.

MR. ROBERTS: And have we been able to find that transcript for the 14th?

MR. GARCIA: Your Honor, we have the written transcript, but they are bringing the tape of the 14th from the FBI headquarters – I mean, from the office, and it should be here this afternoon.

MR. ROBERTS: Okay.

Q. (BY MR. ROBERTS) But I just want to ask a couple of questions even though it's not before us.

From your memory of that conversation, isn't there a point in that conversation you guys feel fine and everything, the doc- – Dr. Bieganowski is saying, "You guys feel fine, everything is okay."

Isn't there a point where he says that to you?

A. Yes, sir.

Q. And he even uses the words, "You're finished," doesn't he?

A. I don't recall, but it's possible.

Q. Okay. And then you-all, one or the other of you, say, "Well, we missed a bunch of appointments."

[10-173] A. Correct.

Q. Why did you guys say that?

A. Well, because we had.

Q. Well, I understand that. But why not just let him dismiss you and get you out of practice – I mean, out of this office?

A. Well, if that was to occur, it would have occurred the 27th, when we told him we weren't injured or hurt, the first time we saw him. He could have released us then, as well.

Q. Oh. But when he says, "You're finished," you guys point out that you're missing these appointments, you've been missing appointments?

A. I believe that was – that was the con- – that came – that conversation occurred prior to him saying we were finished. There was only – if I'm not mistaken, it – we told

him we missed several employments [sic] because I had been out of town.

Q. I understand that. But isn't it a fact, Agent, that your statements, "We've missed appointments," came right after the statement where he says you have finished?

A. I don't recall, sir. I don't have the transcript.

MR. ROBERTS: Your Honor, can I – can I show the witness a copy of mine, to refresh his memory?

APPENDIX "S"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA)	EP-98-CR-959-DB
vs.)	
)	
ARTHUR C. BIEGANOWSKI (1))	
RICHARD J. GOLDBERG (3))	El Paso, Texas
GUSTAVO DIAZ (6))	
JESSE JAIME LOPEZ (7))	
GUADALUPE RODRIGUEZ)	
MORALES (9))	April 6, 2000

VOLUME 24 of 43 VOLUMES
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[24-265] pleading guilty. But I believe that it is your position that you believe you really didn't do anything illegal. Am I right?

A. If I would have known it was going to be illegal, I wouldn't have done it.

Q. I'm sorry?

A. If I knew it was going to be illegal, I wouldn't have done it.

Q. At the time that you were doing it, you didn't – you didn't think it was illegal?

A. No.

Q. And you think, now, you didn't do anything illegal; is that right?

A. That's correct.

Q. I think you believe that you were pressured into doing whatever it is you did, that, now, people say is illegal; is that correct?

A. I think I wasn't told the whole broad spectrum of what I was getting myself to [sic].

Q. You were kept in the dark; is that right?

MS. KANOF: I would object, Your Honor. By who? I don't think that's clear.

Q. (BY MR. RAMOS) You were kept – were you kept in the dark?

A. I was not informed of what an administrator would

* * *

APPENDIX "T"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**EP-98-CR-959-DB**
ARTHUR C. BIEGANOWSKI,	§	
et al.	§	

ORDER

(Filed Sep. 13, 1999)

On this day, the Court considered Defendant Arthur C. Bieganowski's ("Defendant") *Ex Parte* Motion to Appoint Experts or to Release Funds to Hire Expert Witnesses and Consultants, filed on July 2, 1999, in the above-captioned cause. The Government filed its Response on July 16, 1999. On September 2, 1999, the Court held a hearing on the matter. After careful consideration of the evidence and arguments presented, the Court is of the opinion that Defendant's Motion should be denied.

Accordingly, **IT IS HEREBY ORDERED** that Defendant Arthur C. Bieganowski's *Ex Parte* Motion to Appoint Experts or to Release Funds to Hire Expert Witnesses and Consultants is **DENIED**.

SIGNED this 13th day of **September 1999**.

/s/ David Briones
THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

APPENDIX "U"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	*	
	*	**No. EP-98-CR-959-DB**
v.	*	
ARTHUR BIEGANOWSKI	*	

MOTION FOR AUTHORIZATION TO RECEIVE AND EXPEND FUNDS FOR DEFENSE [OR IN THE ALTERNATIVE] MOTION FOR COURT APPOINTED EXPERTS

(Filed Mar. 3, 2000)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW ARTHUR BIEGANOWSKI M.D., Defendant in the above styled and number cause, by and through his Attorney of record. CHARLES LOUIS ROBERTS, and moves this court for authorization to receive and expend certain funds to pay for experts and other professionals for the defense at trial, and in the alternative, reurges his motion for court to appoint experts witnesses as to accounting, coding and medical practice to aid in the Defense, and for grounds would show this Court the following:

I.
Previous Defense Motion

The Defense has previously filled an *Exparte Motion to Appoint Experts or Release Funds* which was denied

without a hearing. As of this date the Defense has retained no expert witnesses and has no funds to retain any expert witnesses.

II.
Proffer of Evidence

The Defense reurges this motion and requests an Evidentiary Hearing on this issue, should this evidentiary hearing be denied, the defendant proffers the following:

1. The testimony of Attorney Michael Gibson as an expert as to the level of expenses necessary for expert witnesses in this case, see Exhibit A: *Motion*.

2. The previously filed affidavits of Dr. Bieganowski; and his attorney David Smith to the effect that Dr. Bieganowski does not have the necessary funds to pay for the expert witnesses in this case.

3. The testimony of Richard Goldberg, accountant, or other accountants, and the financial documents already in the hands of the Government such as tax returns, ect . . . [sic]

4. The representation of the Government at the Hearings of August 7, 1998, August 11, 1998, the *Sarch* [sic] *Warrant Afidavits* [sic], the *Indictment*, the *De Novo Detention Hearing* on December 3, 1998 and the Hearing on all Pending Motions, on September 2, 1999.

To the effect that the

III.
Possible funds which could be used for Expert Witnesses

The Defense has been recently made aware of the following two sources of money which could be used for trial.

1. The firm of Victor Bieganowski claims to have $25,000.00 in unpaid medical expenses from settlements, see Exhibit B: *Letter*.

2. A check from John Hancock Insurance policy on the case value of the life insurance policy of Arthur Bieganowski in the amount of $17,009.32.

Since Victor Bieganowski is witness, it is assumed that the Government is aware of the first source of funds if not both sources.

IV.
Authorization for use at Trial

Neither of these two sources of funds have been seized by the Government; However, because of the nature of the case, the Defense requests authorization from the Court and/or the Government to receive and expend these funds in the Defense of the case.

V.
The Government Implicitly Admits that the Defense has no Legal Funds to pay for Expert Witnesses

By stating that for ten (10) years or more that the Defendant's medical practice was a fraud, the government

is implicitly admitting that no legal funds exist or could exist to hire experts. It would be a violation of criminal law for the Defendant and/or his Lawyers to hire experts even if money existed for tha [sic] purpose. Therefore, the defendant Arthur Bieganowski is either indigent as he claims, see exhibit C: *Affidavit*, or is effectively indigent because he cannot legally expend money in his defense as the Government claims.

VI.

The defendant moves for an Evidentiary Hearing on this matter.

WHEREFORE, THE ABOVE PREMISIS [sic] CONSIDERED, the Defendant prays that the Court authorize the receipt and expenditure of funds for trial as prayed for herein, or in the alternative, to appoint experts as to accounting, coding, and medical practice at Government expense.

Respectfully submitted,

/s/ Charles Louis Roberts

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(915) 532-5475
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CERTIFICATE OF SERVICE

The undersigned Attorney certifies that he has a receipt for certificate mail number P 320 735 311 and

has also hand delivered a copy of the foregoing document to the office of DEBRA KANOF, Supervisory Assistant U.S. Attorney, 700 E. San Antonio, Suite 200, El Paso, Texas 79901, on the 3 day of March, 2000.

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS

DEFENDANT'S EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	*	
v.	*	**No. EP-98-CR-959-DB**
ARTHUR BIEGANOWSKI, M.D.	*	

EX-PARTE MOTION TO APPOINT EXPERTS OR TO RELEASE FUNDS TO HIRE EXPERT WITNESSES AND CONSULTANTS

(Filed Jul. 2, 1999)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW ARTHUR BIEGANOWSKI M.D., Defendant in the above captioned matter and files this his Motion to Appoint Experts or to Release Funds to Hire Expert Witnesses and Consultants.

I.
Restraint

Arthur Bieganowski, M.D. is currently being held in the El Paso County Detention Facility without Bond. Because of this holding Arthur Bieganowski is unable to practice medicine and procuring [sic] any income to use in the procuring of services for necessary experts and consultants to assists [sic] him in preparing an adequate defense in this cause.

II.
Seized Assets

The Assets that Arthur Bieganowski normally would have at his disposal to use in his defense has been seized or frozen, denying him the use of same.

III.
$172,000 for Defense and Family Maintenance

The Government had allocated the release of one hundred seventy-two thousand dollars ($172,000.00) for legal representation and family maintenance. These funds are inadequate for proper representation in that this case as stated by the United States Attorney's Office is a complex case dealing with hundreds of thousands of pages of documents requiring over four years to investigate by crack troops of the F.B.I., IRS, and the United States Attorney's Office.

The expenses incurred to date for Defense are as follows:

Amounts of Expense:	Expense Paid to:
$70,000.00	Charles L. Roberts for Attorney Fees
$30,000.00	H. Davidson Smith, III for Attorney Fees
$20,000.00	Copies of Discovery; and other miscellaneous expenses
$1,000.00	Accounting Services to date
$1,000.00	Storage Fee

In addition family maintenance has cost $50,00 [sic] to date. The assets allotted of the Government to Arthur Bieganowski, have been exhausted. Yet it is necessary for an adequate defense that Arthur Bieganowski have numerous experts be appointed to assets in his defense.

IV.
Necessary Experts

CODE EXPERT

It would be necessary to appoint a code expert to assist counsel in the understanding [sic] the complex matter that make up the world of medical billing. Counsels for Arthur Bieganowski are not knowledgeable in this area. Counsel must be properly schooled in this area to properly prepare an adequate defense for Arthur Bieganowski as well as prepare for cross examination of Government's numerous witnesses in this area.

It is necessary to secure the services of LINDA HOWARD an expert in medical coding to bring counsels for Arthur Bieganowski up to speed in this area. Mrs. Howard

has an expertises [sic] in medical billings and has assisted numerous medical practitioners in the El Paso area with developments of proper medical billing procedure.

In addition Mrs. Howard could assist Defense counsel with understanding the workings of Dr. Arthur Bieganowski's practice.

LEGAL EXPERT ON CODES

Due to the complex nature of the allegation and the subject matter of same it would be necessary to secure the services of an attorney on the trial term [sic] who has a working knowledge of the Codes used in Medical billing. Without this key team member it would be impossible to properly cross examine the experts called by the government thus depriving Arthur Bieganowski a fair opportunity to prepare his case and denying him the right to a vigorous cross examination of the Government's witnesses.

RICK ROBINSON, ESQ. is an attorney practicing out of Washington D.C. and is considered one of the premier litigators in this area.

Mr. Robinson has reviewed the Indictment in the instant case and feels his attorneys fees in this complex case would range anywhere from Two hundred-thousand ($200,000) to Three hundred-thousand ($300,000) dollars.

CERTIFIED PUBLIC ACCOUNTANTS

It would be necessary to retain a forensic accountant to assist counsel in the preparation of this cause due to the large number of documents.

Additional [sic] a consulting accountant will be need [sic] to assist in the preparation of the defense case.

COMPUTER ANALYST

Due to the huge volume of documents it will be necessary to catalog all documents. It will be impossible to do so without the help of an individual well trained in this area. To go to trial in this case without proper indexing would deny Arthur Bieganowski of the right to an adequate defense.

PRIVATE INVESTIGATOR

An Investigator is necessary to assist in reviewing documents and developing the defense case.

EXPECTED COST OF EXPERTS

Code Experts	$200,000.00 to $300,000.00
CPA	$150,000.00 to $300,000.00

V.
Governments Release of Assets

At the time of Arthur Bieganowski [sic] incarnation [sic] he was a successful practitioner of the medical arts treating thousands of El Pasoans. Since his detention he has not had the luxury of earning a living. All of Arthur Bieganowski's assets have been frozen or seized by the government. It would be necessary to release these assets so that Dr. Bieganowski may adequately defend himself and have those experts that are necessary to assist him in same.

This motion is not made for the purpose of delay but in the interest of justice.

WHEREFORE, PREMISES CONSIDERED, Arthur Bieganowski prays that this Court grants this Motion to Appoint Experts or Release Assets.

Respectfully submitted,

By: /s/ H. Davidson Smith

H. Davidson Smith, III
State Bar No. 18722000
1006 Magoffin Avenue
El Paso, Texas 79901
Telephone: (915) 533-5551
Facsimile: (915) 545-2485

CERTIFICATE OF SERVICE

This is to certify that on July 2, 1999 a true and correct copy of the above and foregoing document was served on the Assistant United States Attorney, Debra Kanoff, 511 E. San Antonio, El Paso, Texas, by hand delivery.

/s/ H. Davidson Smith
H. Davidson Smith, III

AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

BEFORE ME the undersigned authority, on this the 2nd day of July, A.D., 1999, appeared MICHAEL R. GIBSON, who after being by me duly sworn, deposed and stated the following:

I recently had the honor of representing Dr. Anthony Valdez, a Physician of the City of El Paso, Texas, in connection with criminal charges brought against him by the United States Government, which case resulted in a jury verdict of not guilty on all counts.

I have been asked to prepare an Affidavit to be presented to the Court in connection with certain defense motions in a similar case involving Dr. Arthur Bieganowski. The request has been made that I affirm the approximate costs of Dr. Valdez defense, in light of the complexity of the Valdez case and in comparison with the issues in the Bieganowski case.

I have some familiarity with the Bieganowski matter since I have been retained by Dr. Bieganowski and his wife to contest the forfeiture of virtually all of his assets and have filed the appropriate claims with the seizing agency. Additionally, Dr. Bieganowski has discussed with me on several occasions the possibility of my representing him in the criminal matter. Because of my familiarity with the lengthy preparation required in Dr. Valdez matter and the much bigger scope of the Bieganowski case I did not feel comfortable in taking Dr.

Bieganowski on as a client due principally to his lack of assets to pay the costs of the Defense.

The following is a list of approximate costs, obtained from Dr. Valdez office manager and based in part upon my own recollection:

a. Jury selection and limited mock trial exercise	$7,500.00
b. Certified Public Accountant audit and evidence preparation	$150,000.00
c. Private Investigator	$5,000.00
d. Computer Analyst	$5,000.00
e. Attorney's fees (3 lawyers)	$250,000.00
TOTAL	**$413,500.00**

The Valdez case required many weeks of preparation and took approximately eight days to try. It took the Government approximately four years to prepare for the trial of the case. There were six boxes of letter size documents, approximately two feet in depth, to be examined and organized and a like amount of collated computer printouts relating to the organization of said documents and the information therein contained. It is my understanding from conversations with both former and present counsel for Dr. Bieganowski that the exhibits involved are many, many times the number of those involved in the Valdez matter and I find it logical to believe that the costs of trial preparation, expert witnesses and organization of defense exhibits will greatly exceed that involved in the Valdez case.

/s/ Michael R. Gibson
MICHAEL R. GIBSON
Attorney at Law

SWORN TO AND SUBSCRIBED before me on this the 2nd day of July, A.D., 1999.

/s/ Barbaca Nearing
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS
Commission expires: 12-28-02

[SEAL]

DEFENDANT'S EXHIBIT B

BIEGANOWSKI & ALLEN, P.C.
ATTORNEYS AT LAW

[Names and Address Omitted In Printing]

February 28, 2000

VIA-FACSIMILE

Mr. Charles Roberts
Attorney at Law
215 N. Stanton, Ste. 611
El Paso, TX 79901

RE: DR. ARTHUR BIEGANOWSKI – MEDICAL PAYMENTS COLLECTED FROM PERSONAL INJURY CASES

Dear Mr. Roberts:

Please be advised that I have tried to reach you several times regarding the medical records from Dr. Bieganowski, to no success.

This is to advise you that we presently have approximately $25,000.00 in our Trust Account on behalf of Dr. Bieganowski's unpaid medical services.

I have contacted my attorney, Gary Weiser, and asked what to do with this sum of money. He has advised me to ask you what Dr. Bieganowski's wishes are to these monies. Please contact Gary Weiser or myself to let us know what Dr. Bieganowski wants done.

Thank you.

Yours very truly,

/s/ Victor J. Bieganowski
Victor J. Bieganowski

VJB

cc: Gary Weiser

DEFENDANT'S EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	*	
	*	
	*	**No. EP98CR0959**
v.	*	
ARTHUR BIEGANOWSKI	*	

AFFIDAVIT OF DEFENDANT

BEFORE ME, THE UNDERSIGNED AUTHORITY, personally appeared, ARTHUR BIEGANOWSKI, who known to me to be ARTHUR BIEGANOWSKI, and being by me duly sworn, upon his oath, stated as follows:

My name is ARTHUR BIEGANOWSKI, I am over the age of eighteen (18), I have never been convicted of a

felony, I am of sound mind and in all other respects I am qualified to make this affidavit. The facts stated herein to the best of my knowledge are true and correct.

Neither myself nor my wife, Sandra Bieganowski, have any funds to hire experts for accounting, coding, and medical practice.

All funds which were designated as *legal* funds have been expended for attorney fees, support for my family while I have been incarcerated, and legitimate expenses such as transcripts and copies.

Further affiant sayeth naught.

/s/ Arthur Bieganowski
ARTHUR BIEGANOWSKI

SUBSCRIBED AND SWORN TO BEFORE ME on this the 03 day of February, 2000, to certify which witness my hand and seal of office.

/s/ [Illegible]
Notary Public in and for the
State of Texas

[SEAL]

Commission expires:

07/24/2002

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	*	
	*	**No. EP98CR0959**
v.	*	
ARTHUR BIEGANOWSKI	*	

AFFIDAVIT OF DEFENSE COUNSEL

BEFORE ME, THE UNDERSIGNED AUTHORITY, personally appeared, H. DAVID SMITH, who known to me to be H. DAVID SMITH, and being by me duly sworn, upon his oath, stated as follows:

My name is H. DAVID SMITH, I am over the age of eighteen (18), I have never been convicted of a felony, I am of sound mind and in all other respects I am qualified to make this affidavit. The facts stated herein to the best of my knowledge are true and correct.

Because of the Government's extremely wide reaching indictment and supporting allegations as to the fraudulant nature of doctor Bieganowski's practice form [sic] the 1980's to 1998's [sic] and because of the charges and allegations of money laundering, I can state that I am not aware of any funds which could be legally expended by me on my client ARTHUR BIEGANOWSKI: to hire experts for the trial or this case. I believe that such experts in accounting, coding, and medical practice are absolutely necessary to defend this case at trial.

/s/ H. David Smith
H. DAVID SMITH

SUBSCRIBED AND SWORN TO BEFORE ME on this the 3rd day of March, 2000, to certify which witness my hand and seal of office.

/s/ Monica Buschardt
Notary Public in and for the State of Texas

[SEAL]
Monica Buschardt
Commission expires:
August 4, 2002

My commission expires:
Aug. 4, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	*	
v.	*	**No. EP-98-CR-0959-db**
ARTHUR BIEGANOWSKI, M.D.	*	

MEMORANDUM IN SUPPORT OF DEFENDANT'S FIRST AMENDED EX-PARTE MOTION TO APPOINT EXPERTS OR TO RELEASE FUNDS TO HIRE EXPERT WITNESSES AND CONSULTANTS

To the Honorable Judge of Said Court:

COMES NOW ARTHUR BIEGANOWSKI M.D., Defendant in the above styled and numbered cause, by and through his attorney of record, CHARLES LOUIS

ROBERTS, and submits the following authorities in support of his motion:

1. *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970).

2. *United States v. Theriault*, 440 F.2d 713, 716 (5th Cir. 1971)

3. *United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984)

4. *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1975)

5. *United States v. Durant*, 545 F.2d 823 (2nd Cir. 1976)

6. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)

7. Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975) [*citing*: Gilmore v. Lynch, 319 F.Supp. 105, 110 (N.D.Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15, 92 s. Ct. 250, 30 L.Ed.2d 142 (1971)].

8. *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972).

9. *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d. 18 (1976); *Wofford v. Wainright*, 748 F.2d 1505, 1507 (11th Cir. 1984).

10. *Morris v. Slappy*, 461 U.S. 1, 23, 103 S. Ct. 1610, 1622, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring in result).

11. *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988)

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS
Attorney for Defendant
State Bar No. 17000100
215 N. Stanton, Suite 611
El Paso, Texas 79901
(915) 532-5475
(915) 534-7417 Fax

CERTIFICATE OF SERVICE

The undersigned Attorney certifies that he has a receipt for certificate mail number P 320 735 311 and has also hand delivered a copy of the foregoing document to the office of DEBRA KANOF, Supervisory Assistant, 700 E. San Antonio, Suite 200, El Paso, Texas 79901, on the 3rd day of March, 2000.

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS